

2010

Strawberry Water Users Association v. United States of America : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

In the matter of the General Determination
of the Rights to the Use of All the Water,
both Surface and Groundwater, within the
Drainage Area of Utah Lake and Jordan
River in Utah, Salt Lake, Davis, Summit,
Wasatch, Sanpete and Juab Counties

Subcase:

Strawberry Water Users Association

v.

United States of America

Brief of Appellants

Appellate Case No. 20100921-CA

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Judge Kate Toomey

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IDENTIFICATION OF THE PARTIES

Appellants:

Magna Water Company (“Magna Water”): Objector to the Proposed Determination

South Farm, LLC (“South Farm”): Objector to the Proposed Determination

For ease of reference, Magna Water and South Farm are jointly referred to herein as “Objectors.”

Appellees:

Strawberry Water Users Association (“SWUA”): Section 24 Petitioner and an Objector to the Proposed Determination

Strawberry High Line Canal Company (“SHLCC”): Section 24 Petitioner and an Objector to the Proposed Determination

For ease of reference, SWUA and SHLCC are jointly referred to herein as “SWUA” or “Petitioners.”

United States of America, Dept. of Interior, Bureau of Reclamation (“United States”): Section 24 Respondent and an Objector to the Proposed Determination

Utah State Engineer (“State Engineer”): Section 24 Respondent

Central Utah Water Conservancy District (“CUWCD”): An Objector to the Proposed Determination

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STATEMENT OF JURISDICTION

This is an appeal from the trial court's Judgment on Petitioners' Motion for Summary Judgment Re: Objectors' Lack of Standing and Order on Objectors' Motion to Strike ("Summary Judgment Order"), entered on September 30, 2010 by the Third District Court. This Court has appellate jurisdiction of this appeal pursuant to Utah Code Annotated section 78A-4-103(3)(j) and the Utah Supreme Court's Order dated December 1, 2010, transferring this appeal to this Court

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues set forth below derive from the Third District Court's Summary Judgment Order:

Issue 1: Did the District Court err in concluding that Objectors lack alternative standing to object to the State Engineer's Proposed Determination, which substantively changes the law of return flow, even though the Utah Supreme Court has acknowledged the significant public importance of the law of return flow and Objectors are water users in the import basin and are the only parties remaining who have raised the issue regarding use of return flow water? (Issue Preserved: R. 2312–2317.)

Standard of Review: Utah's appellate courts "review a district court's decision to grant summary judgment for correctness, granting no deference to the district court's conclusions, and [they] view the facts and all reasonable inferences in the light most favorable to the nonmoving party." *City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 8, 233 P.3d 461 (quoting *Bodell Constr. Co. v. Robbins*, 2009

UT 52, ¶ 16, 215 P.3d 933). “Standing is a question of law that [they] review for correctness, ‘affording deference for factual determinations that bear upon the question of standing, but minimal deference to the district court’s application of the facts to the law.’” *Id.* ¶ 9 (quoting *Cedar Mountain Envtl., Inc. v. Tooele County*, 2009 UT 48, ¶ 7, 214 P.3d 95 (internal quotation marks omitted)).

Issue 2: Did the District Court incorrectly conclude that the Objectors lack traditional standing to object to the Proposed Determination based on their groundwater rights, and have not presented evidence supporting a finding that they would suffer a distinct and palpable, particularized injury due to the Proposed Determination, because they did not file affidavits in opposition to SWUA’s motion for summary judgment, even though Objectors filed and pointed the trial court to their sworn Objection and verified answers to interrogatories? (Issue Preserved: R. 1906–1923, 2302–2307, 2348–2366, 2369–2386.)

Standard of Review: Utah’s appellate courts “review a district court’s decision to grant summary judgment for correctness, granting no deference to the district court’s conclusions, and [they] view the facts and all reasonable inferences in the light most favorable to the nonmoving party.” *Grantsville*, 2010 UT 38, ¶ 8 (quoting *Bodell*, 2009 UT 52, ¶ 16). “Standing is a question of law that [they] review for correctness, ‘affording deference for factual determinations that bear upon the question of standing, but minimal deference to the district court’s application of the facts to the law.’” *Id.* ¶ 9 (quoting *Cedar Mountain*, 2009 UT 48, ¶ 7 (internal quotation marks omitted)).

Additionally, “since an affidavit is simply a method of placing evidence of a fact before the court,” whether a party complied with the requirements of Rule 56(e) of the Utah Rules of Civil Procedure is governed by “decisions regarding the admission of evidence more generally.” *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 25, 982 P.2d 65. The appellate courts “review a trial court’s decision to admit evidence to determine whether the court exceeded its permissible range of discretion.” *State Farm Fire & Cas. Co. v. Forced Aire, LC*, 2009 UT App. 15, ¶ 15, 202 P.3d 299 (quoting *Johannessen v. Canyon Rd. Towers Owners Ass’n*, 2002 UT App. 332, ¶ 13, 57 P.3d 1119).

Issue 3: Did the District Court err in concluding that the Objectors lack traditional standing to object to the Proposed Determination even though it is undisputed that the Proposed Determination would directly affect water deliveries under Objectors’ water shares in Utah Lake/Jordan River water companies? (Issue Preserved: R. 2308–2311.)

Standard of Review: Utah’s appellate courts “review a district court’s decision to grant summary judgment for correctness, granting no deference to the district court’s conclusions, and [they] view the facts and all reasonable inferences in the light most favorable to the nonmoving party.” *Grantsville*, 2010 UT 38, ¶ 8 (quoting *Bodell*, 2009 UT 52, ¶ 16). “Standing is a question of law that [they] review for correctness, ‘affording deference for factual determinations that bear upon the question of standing, but minimal deference to the district court’s application of the facts to the law.’” *Id.* ¶ 9 (quoting *Cedar Mountain*, 2009 UT 48, ¶ 7 (internal quotation marks omitted)).

Issue 4: Did the District Court err in concluding that Objectors lack standing to object to the Proposed Determination even though Utah Code section 73-4-24 grants statutory standing to “water users” and “interested parties” such as Objectors? (Issue Preserved: R. 2297–2302.)

Standard of Review: Utah’s appellate courts “review a district court’s decision to grant summary judgment for correctness, granting no deference to the district court’s conclusions, and [they] view the facts and all reasonable inferences in the light most favorable to the nonmoving party.” *Grantsville*, 2010 UT 38, ¶ 8 (quoting *Bodell*, 2009 UT 52, ¶ 16). “Standing is a question of law that [the appellate courts] review for correctness, ‘affording deference for factual determinations that bear upon the question of standing, but minimal deference to the district court’s application of the facts to the law.’” *Id.* ¶ 9 (quoting *Cedar Mountain*, 2009 UT 48, ¶ 7 (internal quotation marks omitted)).

DETERMINATIVE STATUTE

A copy of the following determinative statute is attached in the Addendum:

Utah Code Ann. § 73-4-24 (1989)

STATEMENT OF THE CASE

I. Nature of the Case

This appeal is from the Judgment on Petitioners' Motion for Summary Judgment Re: Objectors' Lack of Standing and Order on Objectors' Motion to Strike ("Summary Judgment Order"), entered on September 30, 2010 by the Third District Court. (A copy of the Summary Judgment Order is attached as Addendum A.)

II. Course of Proceedings & Disposition Below

The Strawberry Valley Project ("SVP") is a federal reclamation project that imports substantial amounts of water from the Uintah Basin in the Colorado River drainage over the Wasatch Mountains and into the Utah Lake-Jordan River drainage. *See In re Uintah Basin (Strawberry Water Users Assoc. v. Bureau of Reclamation)*, 2006 UT 19, ¶¶ 14–20, 133 P.3d 410 (hereinafter "*In re Uintah Basin*").¹ The SVP water is then administered and used by Strawberry Water Users Association and the Strawberry High Line Canal Company and their shareholders (collectively "SWUA") pursuant to federal contracts with the United States Bureau of Reclamation ("United States"), the record title holder of the water rights. *Id.* After the water is beneficially used by SWUA, a portion of the imported SVP water returns to the natural hydrologic system of the Utah Lake-Jordan River drainage as "return flow," typically through seepage into groundwater

¹ A more detailed and extensive history of reclamation projects, the SVP, and the prior administrative and judicial proceedings leading to this dispute is set forth in *In re Uintah Basin*, 2006 UT 19, ¶¶ 1–6, 9–33. This brief sets forth only those facts relevant to the issues of Objectors' standing.

aquifers or as surface runoff into surface streams and lakes within the Utah Lake-Jordan River drainage. *Id.* ¶ 22.

Both SWUA and the United States claim the right to use the return flow water, even after it commingles with water in the natural hydrologic system. On December 4, 1997, the United States filed Application to Appropriate Water A71269 (55-9271), seeking to appropriate 49,200 acre-feet annually of SVP return flow water (the “United States’ Application”). *Id.* Assuming that the return flow waters eventually migrate to Utah Lake, the United States’ Application sought to divert the return flow water from two points of diversion: (1) the Turner Dam on the Jordan River, and (2) the Utah Lake Pumping Plant at the north end of Utah Lake. (R. 320.) Eight days later, SWUA filed its Exchange Application E3760 to recover the return flows from 64,400 acre-feet annually of SVP water (the “SWUA Application”). *See In re Uintah Basin*, 2006 UT 19, ¶ 22. The SWUA Application sought to pump or divert the SVP return flows from existing wells, springs, and streams in southern Utah County. *Id.* As a result of protests filed by the United States, SWUA, and other entities, the State Engineer has not issued a decision on either application.

In an effort to establish its rights to the SVP return flows, SWUA filed in the Third District Court a petition pursuant to Utah Code section 73-4-24 (1989) (“Section 24”)²

² When SWUA filed the Section 24 petition in 2001, Section 24 gave district courts authority in a general adjudication to conduct a separate proceeding to resolve a “dispute involving the water rights of less than all of the parties to” the general adjudication. Utah Code Ann. § 73-4-24 (1989). “Section 24 represents a simple and common-sense recognition that there may be some disputes involving the water rights of fewer than all of the parties in a water basin, thereby justifying an early hearing and entry

for an interlocutory decree in the long-pending general adjudication of water rights for the Utah Lake-Jordan River drainage.³ *Id.* ¶ 3, SWUA also filed a similar petition in the general adjudication pending in the Eighth District Court (the Uintah Basin), and filed an action in the U.S. District Court for the District of Utah seeking essentially the same relief. *Id.* Both the Third District Court and Eighth District Court dismissed SWUA’s petitions as not proper for a general adjudication, for lack of jurisdiction to address the federal contract issues, and for failure to join the United States in the Uintah Basin general adjudication. *Id.* ¶ 6.

On appeal, the Utah Supreme Court reversed the dismissal of the Section 24 petitions, holding, *inter alia*, that SWUA’s petitions presented unique and significant issues of Utah water law relating to recapture and use of return flow water, for which Utah state courts have exclusive jurisdiction. *Id.* ¶¶ 8, 26, 48, 61.⁴ The Supreme Court explained that one of the important water law issues to be resolved was “which party, **if either**, can *extend control beyond the initial use* made by [SWUA].” *Id.* ¶ 48 (italics in original) (emphasis added). Both SWUA and the United States had assumed that imported water could be released into the natural hydrologic environment and then reused even though it had commingled with naturally occurring water, and that the only question

of an interlocutory decree short of the final decree in the general adjudication.” *See In re Uintah Basin*, 2006 UT 19, ¶ 55, 133 P.3d 410. Section 24 was significantly amended in 2010 for the first time since 1953, but no party has asserted that such amendment is retroactively applicable in this case. Accordingly, all references to Section 24 herein are to the version of the statute in effect at the time of the Petition.

³ For this reason, SWUA is referred to as “Petitioners” in the trial court proceedings.

⁴ The Utah Supreme Court also held that federal courts have exclusive jurisdiction over the federal contract issues. *See In re Uintah Basin*, 2006 UT 19, ¶¶ 8, 45–46, 61.

was which entity (SWUA or United States) was entitled to recapture and use the return flow. (R. 672, 731.)

The Supreme Court specifically and pointedly rejected SWUA's and the United States' assumption. Citing to a long line of Utah case law regarding return flow, the Supreme Court explained that "once the water has passed to the land of another and out of the control of the user, it is subject to recapture and appropriation by others." *Id.* ¶ 50 (citing cases). Considering the application of this rule to imported water, the court further noted that "[w]hether or to what extent imported water is entitled to different treatment does not appear to have been squarely addressed by the court." *Id.* ¶ 58. Thus, the Utah Supreme Court directed the trial court to determine on remand whether "*either* party [can] follow Project water beyond the current user's [SWUA's] reach and then subsequently recapture it?" *Id.* ¶ 48 (emphasis added).

The Supreme Court also affirmed the propriety of the Section 24 proceeding to resolve the state water law issues, *id.* ¶¶ 55, 61, and remanded the cases back to the state district courts for determination of the state water law issues, *id.* ¶ 62. The Supreme Court directed the Eighth District Court to stay its proceedings pending the outcome of the proceedings in the Third District Court and federal district court. *Id.*

On remand from the Supreme Court, the Third District Court (hereinafter the "trial court") asked the State Engineer to give his recommendation, in the form of a Proposed Determination, on the Utah water law issue regarding SWUA's or the United States' right, if any, to recapture and use SVP return flow water. (R. 1312–1313.) Specifically, the State Engineer was directed to address

Whether the SVP is entitled to a credit under Utah law allowing subsequent use, either directly or by exchange, of the identifiable return flow from the additional water imported from the Uinta Basin under the SVP water rights after the return flows have commingled with the water naturally tributary to or occurring in Utah Lake.

(R. 1333–1336, 1751.)

As ordered by the trial court, and pursuant to Section 24, SWUA and the State Engineer mailed over 10,000 notices of the proceeding to individual water users having a direct interest in the dispute, and public notice was published for all others in the Utah Lake-Jordan River drainage system.⁵ (R. 1313–1314, 1341–1676, 1750–1751 (Copies of the Notices for Mailing and Publication are attached as Addendum B).) The notices invited those interested in participating in the Section 24 proceeding and in the State Engineer’s forthcoming Proposed Determination to file a statement of interest with the trial court.⁶ (R. 1333–1336.) Objectors, among others, timely filed statements of interest with the trial court. (R. 1801, 1805.) After receipt of notice, over 600 persons and entities requested that they receive service of pleadings filed in the Section 24

⁵ The trial court approved the group of persons entitled to receive the notice based on the requirements of Section 24 and the McCarran Amendment to the Reclamation Act of 1902. (R. 1309–1315.) The McCarran Amendment waives the United States’ sovereign immunity to suit in state courts only for a general adjudication. *See In re Uintah Basin*, 2006 UT 19, ¶¶ 23–26, 53–55 (citing 43 U.S.C. § 666).

⁶ The notices provided: “Upon service of this notice upon you, you and any potentially affected water rights that you may claim will be subject to the jurisdiction of the Third Judicial District Court. If you determine any water rights that you claim may be affected by this action and you desire to protect your interest, it will be your responsibility to participate in this action. . . . All water users and/or claimants who are served notice of this action will be bound by the Court’s decision, regardless whether they actively participate in this action.” (R. 1334, 1336.)

proceeding. (R. 1853–1885 (A copy of the Comprehensive Certificate of Service is attached as Addendum C).)

Thereafter, on April 14, 2009, the State Engineer issued the Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to the Utah Valley by the Strawberry Valley Project (the “Proposed Determination”). (R. 1888–1892 (A copy of the Proposed Determination is attached as Addendum D).) In the Proposed Determination, the State Engineer recommended that the importer of SVP water (whether SWUA or the United States) “retains the right to use SVP return flow directly or by exchange, even after the return flow has commingled with water occurring naturally in the Utah Lake-Jordan River drainage.”⁷ (R. 1892.)

⁷ The purpose of a proposed determination is not to give an opinion on a discrete water law issue, but rather to determine the competing claims to water on a particular hydrologic system. A proposed determination is a creature of Utah’s general adjudication statute, Utah Code Ann. § 73-4-1 *et seq.* The context in which a proposed determination should be issued was explained in *Green River Canal Co. v. Olds (In re Gen. Determination of Rights to the Use of Water)*,:

When a general adjudication is initiated, the state engineer notifies all known water rights holders and provides public notice of the adjudication by publication. Utah Code Ann. § 73-4-4. After the state engineer provides notice, all individuals and entities are required to submit any water rights claims within the area in question to the state engineer. *Id.* § 73-4-5. Following the submission of water rights claims, the state engineer conducts a hydrographic survey of the water system and evaluates the submitted claims. *Id.* § 73-4-3. When the survey is complete and all of the submitted claims have been evaluated, the state engineer then prepares a proposed determination of water rights for the area. *Id.* § 73-4-11.

After issuance of the Proposed Determination, the Objectors timely filed a sworn Objection to the Proposed Determination. (R. 1906–1923 (A copy of the Objection is attached as Addendum E).) Objectors explained that the Proposed Determination departs from long-established Utah law by allowing recapture and reuse of SVP return flows after they have commingled with naturally occurring water. (*Id.*) Objectors also explained that the Proposed Determination will adversely affect Objectors’ water rights and water interests. (*Id.*)

The parties then conducted limited discovery related to Objectors’ standing, during which Objectors served their verified answers to SWUA’s interrogatories, again identifying the adverse effects to Objectors’ water rights and water shares. (R. 2348–2386.) After the deadline for fact discovery related to standing passed, SWUA filed a motion for summary judgment challenging the Objectors’ standing to participate in the Section 24 proceeding and object to the Proposed Determination.⁸ (R. 2021–2178.) The State Engineer and CUWCD filed separate briefs in support of SWUA’s motion. (R. 2182–2191, 2195–2200.) After briefing and a hearing on the motion, the trial court granted the motion for summary judgment and dismissed the Objectors “claims” (i.e. Objection) with prejudice. (R. 2615–2622, 2687:81.)

⁸ Objectors also served discovery requests on SWUA, but SWUA refused to answer any requests related to, among other topics, the quantification of return flow and the hydrologic connection between the return flow and Objector’s water rights. (R. 2214–2218.) Instead, SWUA’s responses claimed that these requests were not relevant to the issue of standing. (*Id.*) Not long thereafter, SWUA filed its motion for summary judgment based, in large part, on affidavits from previously undisclosed expert witnesses who asserted that there is no hydrologic connection between Objector’s water rights and the SVP return flow. (R. 2024–2178)

Even though the Supreme Court had explained that “[t]his is not just a ‘private dispute,’ but potentially impacts many downstream appropriators and involves important water law issues of first impression,” *In re Uintah Basin*, 2006 UT 19, ¶ 61, the trial court held that the Objectors do not have alternative standing. The trial court held in its Summary Judgment Order that (1) the Objectors “are not appropriate parties in this matter because they are not interested or positioned in this matter in such a way to effectively assist the Court,” and (2) “the issues raised in and by the Utah State Engineer’s Proposed Determination have been, or are likely to be, raised by other parties with a stake in this matter.” (R. 2617.)

With respect to traditional standing, the trial court held that Objectors “do not have standing in this matter based on their ownership of shares of stock in Utah Lake/Jordan River water companies” and “do not have a legally protectable interest” based on their groundwater rights. (*Id.*) The trial court also held that the Objectors “have not presented evidence supporting a finding that they would suffer a distinct and palpable, particularized injury due to the Utah State Engineer’s Proposed Determination” because they allegedly “did not file affidavits in opposition” to SWUA’s motion for summary judgment. (*Id.*)

The Objectors now appeal the Summary Judgment Order granting SWUA’s motion for summary judgment.

III. Statement of the Facts

Magna Water District (“Magna Water”) is a Utah improvement district providing culinary water service to approximately 7,500 connections (about 30,000 individuals) in a

service area in western Salt Lake County. Magna Water owns groundwater rights in western Salt Lake County pursuant to which it is entitled to divert approximately 31 cubic feet per second of water, which equates to 13,821 gallons per minute or 22,443 acre-feet per year. (R. 1907–1908.) South Farm, LLC (“South Farm”), is a Utah limited liability company owning approximately 1,200 acre-feet of groundwater rights in southwestern Salt Lake County. (R. 1908–1909.)

In addition to their groundwater rights, Magna Water owns 170 shares in the Utah and Salt Lake Canal Company, and South Farm owns 65.5 shares in the East Jordan Irrigation Company, 41.5 shares in the South Jordan Canal Company, 115 Shares in the Utah Lake Distributing Company, and 949 shares in the Welby-Jacob Water Users Company (collectively, the “Water Companies”). (R. 2352, 2373.) The Water Companies divert surface waters from Utah Lake at the Utah Lake Pumping Plant and from the Jordan River at the Turner Dam, and convey the water through various canals and ditches northward through western Salt Lake County where it is distributed to the Water Companies’ shareholders, including South Farm and Magna Water. (*Id.*)

Utah Lake has experienced three major drought periods since 1920: in the 1930s, 1960s, and 1990s. (*Id.*) During the drought of the 1930s, culminating in 1935, and during the drought of the 1990s, culminating in 1992, Utah Lake dropped below the pumps at the Utah Lake Pumping Plant, leaving the Water Companies without water. (*Id.*) Because the extreme drought patterns and cycles have occurred every 30 years since the 1930s, Utah Lake and the Jordan River are likely to suffer another extreme drought in the near future. (*Id.*)

SUMMARY OF THE ARGUMENT

“Water rights in the State of Utah are of utmost public concern.” *Longley v. Leucadia Fin. Corp.*, 2000 UT 69, ¶ 15, 9 P.3d 762. It is no wonder, then, that the Utah Supreme Court has emphatically warned that “[t]he issues and impacts” of SWUA’s and the United States’ applications to recapture and reuse the SVP return flows “are simply too expansive” to characterize the Section 24 proceeding as a mere private dispute. *In re Uintah Basin*, 2006 UT 19, ¶ 57 n.14. Instead, SWUA’s and the United States’ efforts to recapture and reuse the SVP return flows “potentially reverberates all the way from southern Utah Valley north to where the Jordan River enters the Great Salt Lake,” and “potentially involves rights and interests on a much broader scale than the interests of [SWUA and the United States].” *Id.* ¶¶ 57, 59.

The Proposed Determination recommends that the importer of SVP water can capture SVP return flow water that has been released into the natural hydrologic system. This is a novel concept never recognized by any Utah court or found in any Utah statute. It “ventures into uncharted territory.” *See In re Uintah Basin*, 2006 UT 19, ¶¶ 48, 59.⁹ After an already long and drawn-out legal process in which the Utah Supreme Court refused to validate this novel theory, the trial court was directed to “determine how these well-established [return flow legal] principles should be applied to imported water,” a

⁹ Even Utah’s federal district court has warned that claims to the right to recapture water that has been released and commingled with the naturally occurring water are “novel and expansive if not revolutionary claims in light of precedent[.]” *See Strawberry Water Users Ass’n v. United States*, 2006 WL 538933 at *21 (D. Utah March 3, 2006 (citing precedent), *aff’d* 576 F.3d 1133 (10th Cir. 2009)).

subject that the Supreme Court explained “will deserve full briefing and careful consideration.” *Id.* ¶¶ 50, 59.

Instead, the trial court held that Objectors lack alternative and traditional standing to object to the Proposed Determination, effectively avoiding the perspective of a water user that does not import water and “thereby eliminating all outside competition for return flow from imported water.” *Id.* ¶ 57 n.14. As a result, the trial court will adopt a substantive change in Utah water law without “full briefing and careful consideration” and without the perspective of a non-importer.¹⁰

The trial court erred in concluding that Objectors lack alternative standing to object to the Proposed Determination. Not only does the Proposed Determination attempt to summarily resolve a water right issue of great public importance, but Objectors are appropriate parties to give the issue the full briefing and careful consideration that the issue deserves. Objectors are private and public water suppliers and users with extensive water right and water share interests in the Jordan River drainage in western Salt Lake Valley.

Additionally, the trial court erred in concluding that Objectors lack traditional standing to object to the Proposed Determination. Objectors have contractual rights to the beneficial use of surface water by virtue of their share ownership in the Water

¹⁰ In fact, CUWCD, which has intervened in this proceeding, imports water that is distributed throughout the Salt Lake Valley. It obviously recognizes the precedent-setting nature of this proceeding and the impact it will have on CUWCD’s imported water in this same general adjudication. In fact, other than the State Engineer, the Objectors are the only parties in the Section 24 proceeding who do not import water into the Utah Lake-Jordan River drainage.

Companies, and they are entitled to protect those contractual rights, including in the Section 24 proceeding. Protecting their contractual rights will not affect the contractual rights of other shareholders in the Water Companies; therefore, Objectors may protect their contractual rights to the beneficial use of water individually and in their own name. In fact, SWUA concedes that Objectors' water shares will suffer the adverse effects necessary for traditional standing. With respect to their groundwater rights, Objectors did in fact present evidence of potential adverse effects by their sworn Objection and verified answers to interrogatories (which were made a part of the record).

Finally, Objectors have statutory standing expressly conferred by Section 24 on in-basin "water users" and "interested parties." See Utah Code Ann. § 73-4-24. The purpose of this lower standard is to allow "those persons who have a genuine concern about proposed changes in water rights to voice those concerns before" the trial court and provide the trial court "with all viewpoints relevant to any proposal," such as the Proposed Determination. See *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 15, 82 P.3d 1125.

ARGUMENT

Objectors have standing to Object to the Proposed Determination under three independent bases. First, Objectors have standing by the "alternative test" for standing. See, e.g., *Cedar Mountain Envtl., Inc. v. Tooele County*, 2009 UT 48, ¶ 8, 214 P.3d 95 (holding that plaintiff had alternative standing to challenge county's land use decisions). Second, Objectors' standing is also established by the "traditional test" based on Objectors' shares in the Water Companies as well as their groundwater rights. Third,

Objectors' standing is also conferred by statute, Utah Code Ann. § 73-4-24. *See, e.g., Cedar Mountain*, 2009 UT 48, ¶ 8 (holding that standing to challenge a county land use decision is conferred by County Land Use, Development, and Management Act for “[a]ny person adversely affected . . .”); *Washington County*, 2003 UT 58, ¶¶ 14, 16, 82 P.3d 1125 (standing to challenge State Engineer decision is conferred by Utah Code Ann. section 73-3-14 on “any person aggrieved . . .”).

I. Objectors Have Alternative Standing As Appropriate Parties To Address the Important Public Issue Of Return Flow.

Objectors, as public water suppliers and users in the Utah Lake-Jordan River drainage, have alternative standing to object to the Proposed Determination and its dramatic change in the substantive water law regarding recapture of return flow water. The trial court, however, erroneously concluded that Objectors do not have alternative standing to object to the Proposed Determination. The “alternative test” for standing is an alternative basis to the “traditional test” for standing, and the two are not mutually exclusive. *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 35, 148 P.3d 960 (citing *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)). A party establishes standing under the “alternative test” “by showing that it is [1] an appropriate party [2] raising issues of significant public importance.” *Sierra Club*, 2006 UT 74, ¶ 36.

A. Objectors are appropriate parties.

Objectors are appropriate parties because they are public and private water suppliers and users in the Jordan River drainage and the only water users to object to the Proposed Determination who are not also importers of water and positionally aligned

with SWUA. Under the first element of alternative standing, the Objectors must establish that they are “appropriate part[ies] to raise the issue in the dispute before the court.” *Id.* This “appropriate party” requirement is met by showing two elements: (1) that the Objectors have “the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions,” and (2) “that the issues are unlikely to be raised if the [Objectors are] denied standing.” *Id.* (internal citation and quotations omitted). A party asserting alternative standing “is not required to show that it is the *most appropriate party.*” See *Cedar Mountain*, 2009 UT 48, ¶16 (emphasis in original).

The trial court erroneously concluded that “Objectors are not appropriate parties in this matter because they are not interested or positioned in this matter in such a way to effectively assist the Court.” (R. 2617.) The trial court apparently agreed with SWUA’s conception of the alternative standing test, which incorrectly conflated the “interest necessary” element of alternative standing with the “discrete and palpable injury” element of traditional standing. (R. 2582 (arguing that Objectors are not an appropriate party because Objectors allegedly did not present evidence of adverse effects).) But that interpretation of the “interest necessary” element completely frustrates the purpose of alternative standing and is contrary to controlling case law.

For example, in *Sierra Club*, the Sierra Club sought to intervene in an administrative proceeding to challenge the Division of Air Quality’s action in granting a permit to construct a coal-fired power plant. 2006 UT 74, ¶ 3. The Utah Supreme Court found that the Sierra Club satisfied the two “appropriate party” requirements. First, “[t]he Sierra Club and its members have an interest in ensuring that the construction and

the operation of the [coal power] plant comply with all applicable state and federal environmental laws as well as with state administrative procedures, thus preventing any needless and unlawful pollution or other environmental destruction.” *Id.* ¶ 42. Furthermore, the Sierra Club had the requisite interest to assist the court because it is “an entity focused on protecting the environment.” *Id.* Second, the Court found that “the Sierra Club’s issues are unlikely to be raised effectively unless it is allowed to intervene” because “the Sierra Club presents its own distinct issues,” and even for overlapping issues “the Sierra Club presents the arguments from a different perspective.” *Id.* ¶ 43.

Similarly, in *Cedar Mountain*, the Supreme Court held that the plaintiff CME was an appropriate party and had alternative standing to challenge the county’s actions. 2009 UT 48, ¶ 19. CME was in the business of transporting low-level radioactive waste. The county denied CME’s application to develop a nuclear material disposal site on its property, which was adjacent to its competitor’s nuclear disposal site. After CME sold the property to its competitor, the county reduced the hazardous waste corridor, but amended the competitor’s conditional use permit to expand its nuclear disposal site onto CME’s former property. CME brought a declaratory judgment action asserting that the county illegally amended the competitor’s conditional use permit. On the competitor’s motion for summary judgment, the trial court held that CME did not have standing to challenge the county’s actions.

On appeal, the Utah Supreme Court held that CME was an appropriate party for purposes of alternative standing. *Id.* First, CME had “the necessary interest and expertise” because: (1) “CME, as an adjoining property owner or occupant, has a

sufficient interest in the appropriate permitting of any business with which it shares a boundary”; (2) “[a]s a competing business interested in storing radioactive waste, it has an interest in any modification in the locale wherein the County allows radioactive waste businesses”; and (3) “[a]s a competing waste-oriented business, CME has a working knowledge of the laws and regulations controlling radioactive waste.” *Id.* ¶ 17. Second, no other parties were going to raise the issues or challenge the county’s actions because the short 30-day time period to challenge the county’s actions had passed and only CME had raised a timely challenge. *Id.*

As in *Sierra Club* and *Cedar Mountain*, the Objectors are appropriate parties because they have the interest and expertise necessary to effectively assist the trial court in developing and reviewing all legal and factual questions relevant to the law to be applied to return flow of water. First, both Objectors own groundwater rights and water shares in western Salt Lake County and have an interest in ensuring that their groundwater rights and shares are not adversely affected by recapture of return flow waters that have commingled with water in the natural hydrological system. Both are private or public water suppliers and users having a “working knowledge of the laws and regulations controlling” water rights and water distribution systems. *See Cedar Mountain*, 2009 UT 48, ¶ 17. The Objectors, as water right owners and beneficial users of the Water Companies’ water, have an interest in preserving the state’s water resources and managing them in compliance with state water laws.

Second, the state water law issues regarding the right, if any, to recapture SVP return flows will not be raised if the Objectors are denied standing. No other person or

entity has timely objected to the State Engineer's recommendation in the Proposed Determination.¹¹ *See id.* ¶ 17 (granting CME standing because, *inter alia*, only CME had raised a timely challenge to the county's actions). Even to the extent the aligned parties SWUA, CUWCD, and the State Engineer raise and address the return flow issue, Objectors "present[] arguments from a difference perspective" as non-importers. *See Sierra Club*, 2006 UT 74, ¶ 43. Unlike CUWCD and SWUA, which are both large entities that import water into the Utah Lake-Jordan River drainage, the Objectors do not import any water into the basin. The Supreme Court directed that whether "imported water is entitled to special treatment . . . is a subject that will deserve full briefing and careful consideration at the appropriate time." *In re Uintah Basin*, 2006 UT 19, ¶ 59. Contrary to the Supreme Court's expectation, without Objectors' full participation, there will be little or no briefing and careful consideration of that issue.¹²

¹¹ Two other parties filed nominal objections, but did not object to the State Engineer's ultimate recommendation. The United States protested paragraph 4 of the Proposed Determination as "potentially vague and ambiguous and in need of clarification." (R. 1894.) SWUA declared its "general support of the Proposed Determination" and the State Engineer's recommendation, but qualifiedly objected that the SVP is not an entity with a right to use the return flow water and that SWUA is entitled to all SVP return flows. (R. 1897–1905.)

¹² In fact, Utah law requires the Court to adopt the Proposed Determination if there are no objections to it. *See* Utah Code Ann. § 73-4-12 (1953) ("If no contest on the part of any claimant shall have been filed, the court shall render a judgment in accordance with such proposed determination[.]"). Dismissing Objectors on standing grounds would eliminate the only substantive objection to the Proposed Determination. This Court would then be bound to adopt the Proposed Determination as the rule of law regarding reuse of imported water that has commingled with the natural environment, but without the benefit of a full briefing and hearing on the issue. Indeed, the trial court would lack discretion to rule contrary to the Proposed Determination.

B. Objectors and SWUA raise issues of significant public importance.

Second, to have alternative standing a party must also demonstrate that “the issues it seeks to raise ‘are of sufficient public importance in and of themselves’ to warrant granting the party standing.” *Id.* ¶ 39. This “public importance” requirement is met by showing that the issues (1) “are of a sufficient weight” and (2) “are not more appropriately addressed by another branch of government pursuant to the political process.” *Id.* In *Washington County*, the court stated (in dicta) that water rights questions of great public importance “likely would be found in a case where a large number of people would be affected by the outcome.” 2003 UT 58, ¶ 21.¹³ This is that case.

Indeed, the Utah Supreme Court has already recognized that the issues in this case are of significant public importance. *In re Uintah Basin*, 2006 UT 19, ¶¶ 48–61. A large number of water users in the Utah Lake-Jordan River drainage will be affected by the

¹³ Other issues found to be of great public importance include (1) whether an interlocal agreement for redevelopment of property had been breached, *see City of Grantsville v. Redevelopment Agency of Tooele City*, 2010 UT 38, ¶ 19, 233 P.3d 461; (2) “potential environmental and health-related harms to the citizens of Tooele County” caused by radioactive waste siting, *see Cedar Mountain*, 2009 UT 48, ¶ 19; (3) potential emissions of “hazardous chemicals” and “proximity to homes and recreational areas,” including national parks and areas protected by the federal Clean Air Act, *see Sierra Club*, 2006 UT 74, ¶ 44; (4) “whether a natural parent who has lost custody of his or her child pursuant to an adjudication of neglect is entitled to the parental presumption in a subsequent custody dispute with a non-parent,” *State ex rel. M.W.*, 2000 UT 79, ¶ 13, 12 P.3d 80; (5) the safety of hazardous substances disposal operations, *see Sierra Club v. Solid & Hazardous Waste Control Bd.*, 964 P.2d 335, 339–40 (Utah Ct. App. 1998); and (6) exchange of state trust lands for county lands, and “preserving the unique scenic, recreational, archaeological, and paleontological values that exist in some of the state school lands,” *Nat’l Parks & Conservation Ass’n v. Bd. of State Lands*, 869 P.2d 909, 914 (Utah 1993).

Proposed Determination because it seeks to create a new class of water rights with a priority superior to every other water right in the basin. The Utah Supreme Court has expressly noted that the issues raised in the Section 24 proceeding “venture[] into uncharted territory,” “involve[] major policy issues *relating to the control, appropriation, use or distribution of water*,” and “potentially reverberate[] all the way from southern Utah Valley north to where the Jordan River enters the Great Salt Lake.” *In re Uintah Basin*, 2006 UT 19, ¶¶ 48, 52, 57 (quotation marks and citation omitted) (emphasis in original)). Even SWUA acknowledged that the return flow issue is “of great significance in Utah water law[.]” (R. 673.)

The State Engineer previously argued that this is merely a private dispute between SWUA and the United States, *see id.* ¶ 57, but the Utah Supreme Court rejected that notion. “There may be some motivation for these parties to characterize this as a ‘private dispute,’ thereby eliminating all outside competition for return flow from imported water. *The issues and impacts are simply too expansive to allow this.*” *Id.* ¶ 57, n.14 (emphasis added). Indeed, upon commencement of the Section 24 proceeding, over 10,000 notices were sent to water users having a direct interest in the dispute, and public notice was published for all others. (R. 1341–1676, 1750–51, 1815–1852, 2657–2677.) Of those who received notice, over 600 persons and entities requested that they receive service of pleadings filed in the Section 24 proceeding. (R. 1853–1885 (Addendum C).) This is the “public importance” water case foreseen by *Washington County* “where a large number of people would be affected by the outcome.”

Finally, the importers' right to reuse the SVP return flow after it returns to the natural environment is not more appropriately addressed by other branches of government. Utah case law on this issue has already been clearly established, as Objectors have explained in their Objection. However, CUWCD has cited in its response to the Objection one Utah case and cases from other jurisdictions for the principle that return flow of imported water is treated differently. (R. 1928–1934.) No existing state statute has addressed or resolved this issue. This issue is therefore one of judicial construction of apparently conflicting case law and interpretations. Such a dispute is of the type that the courts were established to resolve.¹⁴

Most importantly, the Utah Supreme Court in *In re Uintah Basin* acknowledged that “[w]hether or to what extent imported water is entitled to different treatment does not appear to have been squarely addressed by this court.” 2006 UT 19, ¶ 58. Indeed, “[i]t seems elementary that Utah courts must determine how these well-established principles should be applied to imported water.” *Id.* ¶ 50. While only holding that Utah courts, rather than federal courts, must determine Utah water law issues, the Supreme Court implicitly recognized that the issues are properly resolved by the courts rather than another branch of government. For this reason, the Supreme Court held that “[t]he water rights dispute of these parties is appropriate for resolution under Utah’s general adjudication statute of which Section 24 is an integral part.” ¶ 61. The Supreme Court

¹⁴ It cannot be said that this issue is better resolved by an administrative agency, i.e. the State Engineer. The State Engineer’s Proposed Determination, which seeks to resolve the issue, is subject to approval by the trial court through the general adjudication process. *See* Utah Code Ann. § 73-4-12.

thus remanded this case to the trial court to determine how the rights to the return flows of imported waters are to be “recognized, treated, or applied under Utah water law.” *Id.* ¶ 62. Such an issue is best addressed by the courts.

The Objectors are appropriate parties raising issues of sufficient public importance, with alternative standing to object to the Proposed Determination and fully participate in the Section 24 proceeding.

II. Objectors Satisfy The Traditional Test For Standing.

In addition to alternative standing, Objectors also meet all requirements for traditional standing. The traditional test for standing requires that a person invoking the jurisdiction of the court “allege that it has suffered or will ‘suffer[] some distinct and palpable injury that gives [it] a personal stake in the outcome of the legal dispute.’” *Sierra Club*, 2006 UT 74, ¶ 19 (quoting *Jenkins*, 657 P.2d at 1148). To show that it has suffered or will suffer a “distinct and palpable injury,” a party must establish that it “has been or will be ‘adversely affected by the [challenged] actions[.]’” *Id.* (quoting *Jenkins*, 675 P.2d at 1149, 1150) (alterations in original).¹⁵

Adverse effects must be “particularized” or personal to give the person a personal stake in the outcome of the dispute. For example, in *Sierra Club*, 2006 UT 74, the

¹⁵ Under the traditional test for standing, a party invoking the jurisdiction of the court must also establish two additional elements: (1) there exists a “causal relationship ‘between the injury to the party, the [challenged] actions and the relief requested’”; and (2) “the relief requested must be ‘substantially likely to redress the injury claimed.’” *Sierra Club*, 2006 UT 74, ¶ 19 (quoting *Jenkins*, 657 P.2d at 1149, 1150). *See also Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 17, 228 P.3d 747. In the trial court proceedings, SWUA only challenged the first element—adverse effects. Neither the trial court nor any party has claimed that Objectors do not satisfy the last two elements for traditional standing.

Supreme Court found that the Sierra Club plaintiffs identified sufficient adverse effects by alleging “injuries to their health, property, and recreational activities.” *Id.* ¶ 24. While these same adverse effects could be felt by thousands of others living in or visiting the area, the court focused on the fact that these specific injuries were personal and particularized to the plaintiffs. *Id.* “That others may also share their concerns and be subject to the same specific, individualized injuries does not make the potential harms any less personal[.]” *Id.* The requirement is not that the injury be unique and/or exclusive, but only that it be personal or particularized.

Recently, the Utah Supreme Court also clarified that where the adverse effects are potential rather than actual, “imminent injury is not required.” *See Brown v. Div. of Water Rights*, 2010 UT 14, ¶ 18, 228 P.3d 747. A plaintiff seeking standing must “set forth allegations establishing that a *reasonable probability*, as opposed to a mere possibility, of future injury exists.” *Id.* ¶ 19 (emphasis added). Past injury is evidence that adverse effects are “reasonably probable.” *See Cedar Mountain*, 2009 UT 48, ¶ 13 (“[P]roof that storage of radioactive waste in Tooele County polluted neighboring properties in the past is sufficient to establish a more than speculative potential of future harm to neighboring properties, such as CME.”).

As explained below, Objectors will suffer, and properly presented evidence of, adverse effects to their groundwater rights and water shares in the Water Companies.

A. Objectors presented evidence that their water shares and water rights will be adversely affected by adoption of the Proposed Determination.

The trial court erred in concluding that Objectors did not have traditional standing. The trial court held in its Summary Judgment Order that Objectors “have not presented evidence supporting a finding that they would suffer a distinct and palpable, particularized injury due to the Utah State Engineer’s Proposed Determination” because they “did not file affidavits in opposition” to SWUA’s motion for summary judgment. (R. 2617.) In doing so, the trial court failed to consider the Objectors’ verified Objection as well as their verified answers to interrogatories, which set forth in detail the adverse effects to Objectors’ water rights.

Rule 56 of the Utah Rules of Civil Procedure provides that summary judgment shall be granted “if the *pleadings*, depositions, *answers to interrogatories*, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Utah R. Civ. P. 56(c) (emphasis added). In accordance with the language of Rule 56, Utah courts have held that a party may rely on verified statements other than affidavits to successfully oppose summary judgment. *See, e.g., Pentecost v. Harward*, 699 P.2d 696, 698 (Utah 1985) (“A verified pleading, made under oath and meeting the requirements for affidavits established in Rule 56(e) of the Utah Rules of Civil Procedure, can be considered the equivalent of an affidavit for purposes of a motion for summary judgment.”).

Objectors did present evidence of adverse effects in the form of their sworn Objection and verified answers to interrogatories.¹⁶ (R. 1906–23, 2348–66, 2369–86.) Indeed, the evidence presented by Objectors showed in detail the adverse effects to the Objectors’ water shares and water rights as a result of adoption of the Proposed Determination. Objectors explained that Utah Lake has experienced three major drought periods since 1920: in the 1930s, 1960s, and 1990s. During the drought of the 1930s, culminating in 1935, and during the 1990s, culminating in 1992, Utah Lake dropped below the pumps at the Utah Lake Pumping Plant, leaving the Water Companies without water. Because the extreme drought patterns and cycles have occurred every 30 years since the 1930s, Utah Lake and the Jordan River are likely to suffer another extreme drought in the near future. In such event, it is likely that diversions of the Water Companies’ water rights, and thus Objectors’ water shares, will be subject to reduced diversions. (R. 2304–2305.)

In fact, SWUA admitted that “those canal companies with primary and secondary water storage rights in Utah Lake have direct interests in the surface levels of the Lake,” (R. 2045), and that “reduction in the levels of the Lake may present impairment concerns for these entities,” (R. 2046). SWUA further agreed that “these entities . . . may well experience the ‘direct’ impairment of rights required by *Washington County* as a condition for standing.” (R. 2046–2047.) It is reasonably probable that Objectors’ right to beneficially use water under their water shares will be affected by adoption of the

¹⁶ Objectors made their verified answers to interrogatories a part of the record by incorporating them by reference in and attaching them to Objectors’ memorandum in opposition to SWUA’s summary judgment motion. (R. 2291, 2347–86.)

Proposed Determination and the reuse of SVP return flows in contravention to established Utah law.

In their verified objection and answers to interrogatories, Objectors identified several other reasonably probable adverse effects to their water rights and water shares: First, adoption of the Proposed Determination will require Objectors (and other affected water users) to expend significant resources to defend and protect their water rights from inflated and incorrect return flow calculations and credits by importers such as SVP. Under current Utah law, any water right holder, including water importers, may use return flow from a water right up to the right's consumptive use limit so long as the user maintains physical control of the water. *See In re Uintah Basin*, 2006 UT 19, ¶¶ 50, 58–59 (citing cases); *see also* Objectors' Objection (R. 1909–13 (Addendum E)). There is little-to-no risk under the current law that a water right holder will use more than the actual return flow, because the user has no right to divert return flow from the natural hydrologic system. But the Proposed Determination removes this check for imported water by allowing return flow water to be claimed, diverted, and used directly from the natural hydrologic system. (R. 2307.) Furthermore, under the Proposed Determination, the amount that the importer may claim is not based on measurement or custody, but on estimates. In other words, the amount of return flow actually returning to the natural environment is estimated by experts based on a series of assumptions.

The danger of this new system to Objectors and other downstream users is clear. The SVP imports 64,400 acre-feet of water annually from the Uintah Basin. Even assuming the importer's right to re-divert the actual return flow water from the natural

environment, the Proposed Determination creates a significant risk that the importer will take more than the actual return flow. As a general matter, the return flow amount is the quantity of water not consumed during the initial beneficial use. But if the actual consumption amounts are underestimated by just one half of one percent (e.g., if average consumption over the system is estimated at 50% when it is actually 50.5%),¹⁷ the importer will receive credit for 322 acre-feet of water more than the actual return flow amount. In other words, the SVP would get almost 105 million gallons of water (enough to meet the average indoor uses of 715 homes for a year) at the expense of the water right holders, such as Objectors, in the Utah Lake-Jordan River drainage. Ultimately, Objectors and other water users will need to hire experts to try and prevent such abuses. Such analyses and experts are not required under existing law.

Second, the Proposed Determination, if adopted, would be binding on all water rights in the Utah Lake-Jordan River drainage. *See* Notices for Mailing and Publication (Addendum B); (R. 1311, 1334, 1336.) Objectors, as water right owners within the Utah Lake-Jordan River drainage, would be bound by the trial court's decree approving the Proposed Determination, and would therefore be estopped from contesting the SVP importer's diversion of return flow that have commingled with water in the natural

¹⁷ A calculation error is inevitable given the many factors that impact crop consumption from year to year. For example, consumption varies based on plant type, irrigation methods, precipitation levels, soil characteristics, and a host of other factors. None of these factors are homogeneous over SWUA's service area, and many change from year to year or even within a single year.

environment. (R. 2307.) The trial court's decree would likewise estop Objectors from contesting reuse of imported water from other import projects.¹⁸

Third, adoption of the Proposed Determination would entitle either SWUA or the United States, or their assignees, to maintain ownership of SVP return flow water and use it directly or by exchange, even after the return flow has lost its identity as appropriated water and commingled with water occurring naturally in the Utah Lake-Jordan River drainage. (R. 2305.) Such a result is contrary to established Utah law, which provides that all appropriated water loses its identity as appropriated water the instant it leaves the control of the appropriator and is released into the natural environment and commingles with surface or groundwater. *See In re Uintah Basin*, 2006 UT 19, ¶ 50, 133 P.3d 410 (quoting and citing precedent). In effect, the Proposed Determination removes a lawful benefit, the addition of uncontrolled or lost return flows to the waters of the state subject to appropriation and use by Objectors and others. (R. 2305.)

Fourth, as explained above, adoption of the Proposed Determination allows recapture of the calculated return flow from imported water, which recapture would interfere with Objectors' vested water rights and water shares to the extent that the actual return flow is less than the calculated return flow. For example, inflated upstream

¹⁸ For example, in addition to CUWCD, which imports water for use in the Salt Lake Valley under the Central Utah Project, Kennecott Land Company also owns a number of water rights that are diverted from the Tooele Valley and imported into the Jordan River drainage. These water rights are used in the same area of the Salt Lake Valley as Objectors' water rights. The precedent created by the Proposed Determination would presumably establish the same superior priority to return flow from Kennecott's imported rights as from SVP rights. If Objectors are denied standing in this case, they will be bound by the Proposed Determination and unable to protect their interests if Kennecott seeks to re-divert its commingled return flows.

diversions by the SVP taken as an exchange based on miscalculation of imported return flow water would result in an exaggerated credit for imported return flow water in Utah Lake and may cause reduced flow in the Jordan River. Additionally, overestimation of actual return flow to Utah Lake, and reuse of such overestimated return flows by the SVP, will result in a depressed groundwater table in the shallow aquifer underlying the western Salt Lake Valley. (R. 2306.)

Fifth, the Proposed Determination also provides that the released and commingled SVP water “is superior” to all existing rights and that the imported return flow water “is not subject to priority calls in the Utah Lake-Jordan River drainage.” In this way, adoption of the Proposed Determination subordinates Objectors’ priority water rights and water shares to any calculated or estimated SVP return flows in excess of the actual return flow. Such is true of Objectors’ groundwater rights as well as their water shares. Impairment of Objectors’ water rights is not limited to hydrological impairment, but also impairment of their legal priority. (R. 2305–06.)

Finally, the right to recapture and reuse SVP return flows, and the “superior” right in those return flows, will also expose Objectors, particularly in years of water shortage, to claims of liability for interference with SVP return flow water, to which they have not historically been subject. (R. 2306.) Thus, because Objectors have produced significant evidence of injury to their water rights and water shares, the Judgment granting summary judgment in favor of SWUA was in error.

B. The law does not require for purposes of traditional standing that the court ignore the injury to Objectors' water shares.

The trial court erred in concluding that the injury to water deliveries under Objectors' water shares was not cognizable for purposes of assessing traditional standing.¹⁹ Relying on *East Jordan Irrigation Co. v. Morgan*, 860 P.2d 310, 314 (Utah 1993), SWUA argued that because water share ownership merely entitles the shareholders to "receive their pro-rata amount based on water available under such rights," "impairment claims based on the water rights of the companies in which they own shares must be brought by the companies themselves." SWUA's argument extended *East Jordan* well beyond the issues involved in that case.

The limited issue in *East Jordan* was whether Payson City, a shareholder in East Jordan Irrigation Company, could file a change application on the company's water rights. 860 P.2d at 312 (explaining that "[t]his case ultimately turns on whether a shareholder in a mutual water corporation is 'a person entitled to the use of water' under [Utah Code Ann. § 73-3-3(2)]" and therefore entitled to file a change application.). The court reasoned that only the irrigation company was "entitled to the use of water" under the change application statute (Utah Code Ann. § 73-3-3(2)) because only the company, not Payson, complied with the statutory procedures to appropriate water. *Id.* at 313. Payson's ownership of shares "does not afford it a right conferred by the state 'to the use of water' as contemplated by section 73-3-3(2)." *Id.* Therefore, the court simply held that "Payson does not have standing *before the state engineer* to seek a *change in the*

¹⁹ The trial court did not give any legal analysis for its holding, but simply adopted the arguments made by SWUA, United States, and CUWCD. (R. 2687:81.)

point of diversion.” Id. (emphasis added). Payson’s standing before the State Engineer was governed by the express language of section 73-3-3(2) limiting standing to those “entitled to the use of water.”

The holding did not, however, strip Payson of its rights to water delivery. “What Payson did gain by its purchase of East Jordan shares is the right to receive a proportionate share of the water distributed by East Jordan out of its system in the same manner as all other shareholders.” *Id.* at 314. In other words, although Payson did not own a statutory right to the use of water, it held a contractual and equitable right to the beneficial use of water. *See also, e.g., St. George City v. Kirkland*, 409 P.2d 970 (Utah 1966) (explaining that shareholders in a mutual water company actually own water rights); *Smithfield West Bench Irr. Co. v. Union Cent. Life Ins. Co.*, 142 P.2d 866, 869 (Utah 1943) (“The shareholders are in effect owners in common of the waters with certain limitations as between one another governing the use thereof.”); *Genola Town v. Santaquin City*, 80 P.2d 930, 936 (Utah 1938) (holding that water company stock certificate “is really a certificate showing an undivided part ownership in a certain water supply”).

Like Payson in *East Jordan*, the Objectors have contractual and equitable rights to the beneficial use of water by virtue of their share ownership in the Water Companies, a point that SWUA concedes. (R. 2687:76.) But unlike *East Jordan*, the Objector’s standing to protect their contractual and equitable rights by objecting to the Proposed

Determination is not governed or limited by a specific statute limiting standing to only those persons statutorily “entitled to the use of water.”²⁰

Nor do the corporate law principles relied on in *East Jordan* have any bearing in this case. While management of a corporation by directors, not shareholders, generally prevents “havoc” and “discord” among the water users, the risk for “havoc” and “discord” is not present here because there is no affirmative action to be taken by the Water Companies and no effect on the rights of other shareholders. While “a change in point of diversion certainly implicates management of the water company as a whole,” 860 P.2d at 314, protecting an individual shareholder’s contractual right to the use of water from impairment by third parties does not implicate management of the Water Companies as a whole. In this case, no Water Company assets are affected or disposed of, no water right diversions are changed or moved, no distribution facilities are relocated or modified, no company water rights are changed, and the companies are not entering into any contracts or assuming any obligations. In sum, this case has no effect on the contractual rights of other shareholders in the Water Companies. Accordingly, derivative action is not required.²¹

²⁰ In fact, to the extent any statute governs Objector’s standing, Utah Code section 73-4-24 confers standing in a Section 24 proceeding on any in-basin “water user” or “interested” person. *See infra* part III.

²¹ As in *East Jordan*, the court in *Badger v. Brooklyn*, 922 P.2d 745, 751 (Utah 1996), held that shareholders in a mutual irrigation company cannot protest the company’s change application. “[T]he statutory authority of the State Engineer does not extend to the resolution of disputes between shareholders and their corporations regarding the distribution of their shares.” *Id.* *Badger* is not implicated in our present case because there is no dispute between Objectors and the Water Companies.

SWUA has argued both in the present case and in its ancillary federal case that its efforts to recapture and reuse imported SVP water are not affected by its lack of legal, record title to the imported SVP water. (R. 89, 111.) *See also In re Uintah Basin*, 2006 UT 19, ¶ 27 (explaining that SWUA’s Section 24 petition “sought a declaration that [SWUA], for the use and benefit of its shareholders, holds equitable title to Project water which the shareholders have applied to beneficial use [SWUA] claims this ownership extends to the right to recapture return flows.”); *Strawberry Water Users Ass’n v. United States*, 576 F.3d 1133, 1146–1147 (10th Cir. 2009). Recognizing the United States’ legal, record title to the SVP water, SWUA nevertheless argued that it has “equitable title” because it and its customers are the beneficial users of the water, and that therefore SWUA is entitled to recapture and reuse the SVP water. *See In re Uintah Basin*, 2006 UT 19, ¶ 27.

Like SWUA, Objectors have the same “equitable title” and right to beneficial use of the Water Companies’ water by virtue of Objectors’ water shares. *See East Jordan*, 860 P.2d at 313 (acknowledging that Payson City was an equitable owner of water rights represented by its water shares). But SWUA now conveniently denies the application of this very principle that it so ardently supported (and upon which its project and the SWUA Application depends) because it would invariably convey standing on Objectors to at least have a voice regarding the Proposed Determination’s adverse effects on Objectors’ water shares. As with SWUA, Objectors’ equitable title and right to beneficial use of water through their water shares give them protectable interests requisite for traditional standing.

Because Objectors presented evidence of reasonably probable injuries to their water rights and water shares, and because there is no legal impediment to recognition of injury to those water shares, the trial court erred in granting summary judgment dismissing Objector's Objection for lack of standing.

III. The General Adjudication Statutes Confer Statutory Standing On Objectors To Object To The Proposed Determination.

In addition to alternative standing and traditional standing, Utah's general adjudication statute confers standing on Objectors to object to the Proposed Determination as both water users and interested parties.²² It is established Utah law that standing may be conferred specifically by statute. *See, e.g., Cedar Mountain*, 2009 UT 48, ¶ 8 (explaining that standing to challenge a county land use decision is conferred by the County Land Use, Development, and Management Act for "[a]ny person adversely affected . . ."); *Washington County*, 2003 UT 58, ¶¶ 14, 16 (explaining that a challenge to a State Engineer decision is conferred by Utah Code Ann. § 73-3-14 on "any person aggrieved . . ."). Objectors' standing to object to the Proposed Determination and participate in the Section 24 proceeding is conferred by the language of Section 24 itself.

Section 24 provides that, in a general adjudication, "any interested party may petition the district court" to adjudicate "a dispute involving the water rights of less than all of the parties" to the general adjudication. Utah Code Ann. § 73-4-24. Once a

²² Although the statutory standing issue was fully briefed and raised by Objectors before the trial court, (R. 2297–2302), the Summary Judgment Order did not expressly rule on Objectors' claim for statutory standing, (R. 2616–2618). By granting SWUA's summary judgment motion, the trial court concluded, implicitly, that Objectors do not have statutory standing to object to the Proposed Determination and participate in the Section 24 proceeding.

Section 24 proceeding is initiated by an “interested party,” notice of the proceeding must be given directly to “[a]ll persons who have a *direct interest* in said dispute” in the manner required by the court. *Id.* § 73-4-24 (emphasis added). Additionally, public notice of the initial hearing must be published so as “to give notice to *all water users* on the system.” *Id.* (emphasis added). In this way, Section 24 confers standing on any “interested party,” all persons having a “direct interest,” and “all water users on the system” so that “the court may hear and determine the dispute.” *Id.*

A. *Objectors have statutory standing as water users in the Utah Lake-Jordan River drainage.*

Objectors, by virtue of their groundwater rights and water shares in the same Utah Lake-Jordan River drainage where the SVP return flows will be recaptured and reused, are “water users” and thus have statutory standing to object to the Proposed Determination pursuant to Section 24.

The plain language of Section 24 does not state who, other than the Section 24 petitioner, is entitled to participate in a Section 24 proceeding, but only who is entitled to receive notice of the initial hearing (“all water users on the system” and “[a]ll persons who have a direct interest in said dispute”). *See* Utah Code Ann. § 73-4-24. But Section 24 implicitly recognizes that the purpose of sending notice is to allow those persons the opportunity to participate in the proceeding “so the court may hear and determine the dispute.” *Id.* The requirement that notice be given to “all water users on the system” would be meaningless if those given notice lacked the right to participate in the hearing. Because “[s]tatutory enactments are to be so construed as to render all parts thereof

relevant and meaningful,” *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT 37, ¶ 9, 94 P.3d 234 (citation and quotation omitted), those entitled to notice must also have standing to participate.

Section 24’s provision of statutory standing to any “water user” in the basin is consistent with the purpose of general adjudications, with the McCarran Amendment, and with general principles of due process. The trial court has repeatedly stated that its decree in the Section 24 proceeding will be binding on all water users in the Utah Lake-Jordan River drainage, including Objectors. For example, the notices for mailing and publication, approved by the trial court, provide:

Upon service of this notice upon you, you and any potentially affected water rights that you may claim will be subject to the jurisdiction of the Third Judicial District Court. If you determine any water rights that you claim may be affected by this action and you desire to protect your interest, it will be your responsibility to participate in this action. . . . *All water users and/or claimants who are served notice of this action will be bound by the [trial court’s] decision, regardless whether they actively participate in this action.*

(R. 1334, 1336 (emphasis added).)²³ Indeed, the trial court recognized that the notice had to be comprehensive in order to satisfy the requirements of Section 24 and the McCarran Amendment, 43 U.S.C. § 666. (R. 1311.) Similarly, Section 24 must also offer statutory standing to all who would be bound by the decree. Absent such standing, the result would be the untenable position where water users are bound by a decree from a proceeding in which they had no ability to participate. In this case, Objectors, having

²³ Significantly, the notices, which were approved by the trial court, provided that the trial court’s decree would bind “all water users,” not merely those with “direct interests” in the dispute.

received notice by publication of the Section 24 proceeding and Proposed Determination, will be bound by the trial court's decree. Yet the trial court denied Objectors the opportunity to participate in the Section 24 proceeding. Due process does not countenance such a result.²⁴

Conversely, if the trial court's decree in the Section 24 proceeding is not binding on all water users in the drainage, the sovereign immunity waiver under the McCarran Amendment would be of no effect. (R. 1311.) In the absence of a binding decree, the trial court has acknowledged that it "cannot proceed because sovereign immunity is not waived." (*Id.*) To prevent this result, Section 24 and the McCarran Amendment require that all water users on the system be allowed to participate in the Section 24 proceeding. Thus, the Objectors have statutory standing as "water users" in the Utah Lake-Jordan River drainage.

B. Objectors have statutory standing as interested parties.

In addition, Section 24 sets forth an "interested party" standard by which Objectors have standing. *See* Utah Code Ann. § 73-4-24.²⁵ A party receiving notice of and seeking to participate in a Section 24 proceeding already properly commenced by an "interested party" need not satisfy a higher standard than that required of the party that

²⁴ As explained above, transbasin water imports are not limited to the SVP. There are other water import projects in the state, including many into the Utah Lake-Jordan River drainage. If the Proposed Determination is adopted, Objectors and all other water users will be estopped from contesting other claims to commingled return flows because they will be bound by the trial court's decree approving the Proposed Determination.

²⁵ Section 24 provides, in relevant part: "If, during the pendency of a general adjudication suit, there shall be a dispute involving the water rights of less than all of the parties to such suit, any interested party may petition the district court in which the general adjudication suit is pending to hear and determine said dispute."

commenced the proceeding. Accordingly, any “interested party” may commence or participate in a Section 24 proceeding. In *Washington County*, the Utah Supreme Court distinguished the lower “interested” standard for participating in administrative proceedings before the State Engineer from the higher “aggrieved” standard required for seeking judicial review of the very same State Engineer decision²⁶: “Unlike the term ‘interested,’ the term ‘aggrieved’ suggests the presence of actual or potential injury. . . . The commonly understood meaning of the term ‘aggrieved’ is consistent with our traditional standing requirement that a plaintiff show particularized injury.” *Washington County*, 2003 UT 58, ¶ 14. Because the legislature used the same “interested” standard for purposes of participation in the administrative change application process and for commencement of a Section 24 proceeding, *Washington County’s* interpretation of “interested” in the change application statute applies equally to Section 24.²⁷

Specifically, the *Washington County* case explains that an “‘interested’ person” is one “who ha[s] a genuine concern about proposed changes in water rights,” and further explains that allowing such broad participation “provides the State Engineer with all viewpoints relevant to any proposal” *Washington County*, 2003 UT 58, ¶ 15 (emphasis in original). This lower “interested” standard for participation in a Section 24

²⁶ Utah Code Ann. § 73-3-14 (1989) provided that “any person *aggrieved* by an order of the state engineer may obtain judicial review” of that order.

²⁷ The change application statute, Utah Code Ann. § 73-3-7(1, provides that “[a]ny person *interested* may file a protest with the state engineer.” (emphasis added). The “interested” standard of Section 24 must be interpreted in the same manner as the “interested” standard for protesting water rights applications. “We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” *Bd. of Educ. of Jordan Sch. Dist.*, 2004 UT 37, ¶ 9 (citation and quotation omitted).

proceeding, as set forth by statute, protects the integrity and purpose of the Section 24 proceeding, just as the “interested” standard does for change application proceedings.

The same reasoning behind allowing “interested” persons to administratively protest change applications is present in the Section 24 proceeding. Inviting and allowing interested persons, such as Objectors, to participate in the Section 24 proceeding “allows those persons *who have a genuine concern about proposed changes* in water rights to voice those concerns before” the trial court and provide the trial court “with all viewpoints relevant to any proposal,” such as the Proposed Determination. *See id.* ¶ 15 (emphasis in original). Indeed, the Utah Supreme Court acknowledged that, not only was Section 24 “properly invoked,” but that the Section 24 proceeding is the proper procedure to resolve this dispute that “potentially involves rights and interests on a much broader scale than the interests of these litigants” and “potentially impacts many downstream appropriators and involves water law issues of first impression.” *In re Uintah Basin*, 2006 UT 19, ¶¶ 59, 61. In order to ensure that this dispute involves interests on a much broader scale than just the interests of SWUA and the United States, other water users and interested persons must be allowed to participate.

In accordance with the plain language of Section 24, standing to participate in this proceeding and object to the Proposed Determination does not require a resort to traditional standing tests. Rather, Section 24, by its plain statutory language, gives a voice to the concerns and viewpoints of those, such as the Objectors, who own water rights in the drainage and who have an interest in challenging the precedential change in

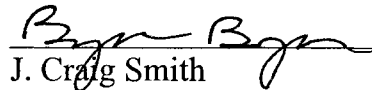
substantive water law that the Proposed Determination will set throughout the entire area of the general adjudication.

CONCLUSION

The trial court erred in concluding that Objectors do not have alternative standing in spite of the Utah Supreme Court's recognition that the issues presented in this case will affect thousands of water users throughout the entire Utah Lake-Jordan River drainage and are too expansive for a mere private dispute. The trial court also erred in concluding that Objectors do not have traditional standing based on either their water shares or their groundwater rights. Finally, the trial court erred in failing to conclude that Objectors have statutory standing to participate in the Section 24 proceedings. Accordingly, Objectors request that this Court reverse the trial court's Summary Judgment Order granting SWUA's motion for summary judgment and remand with directions that the trial court consider the merits of Objectors' Objection to the Proposed Determination.

Respectfully submitted this 29th day of March, 2011.

SMITH HARTVIGSEN, PLLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2011, I caused a true and correct copy of the foregoing **Brief of Appellants** to be served on the following via U.S. mail:

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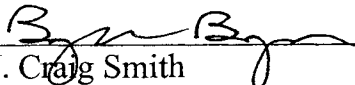
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Submitted this 29th day of March, 2011.

SMITH HARTVIGSEN, PLLC


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Attorneys for Objectors

ADDENDUM

- A** Summary Judgment Order
- B** Notices for Mailing and Publication
- C** Comprehensive Certificate of Service
- D** Proposed Determination
- E** Objectors' Objection to State Engineer's Proposed Determination
- F** Utah Code Ann. § 73-4-24 (1953)

Tab A

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*Attorneys for Petitioner Strawberry High Line
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FILED DISTRICT COURT
Third Judicial District

OCT - 1 2010

By *Kate Toomey*
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

SALT LAKE DEPARTMENT, STATE OF UTAH

IN THE MATTER OF THE GENERAL
DETERMINATION OF THE RIGHTS TO THE
USE OF ALL THE WATER, BOTH SURFACE
AND UNDERGROUND, WITHIN THE
DRAINAGE AREA OF UTAH LAKE AND
JORDAN RIVER IN UTAH, SALT LAKE,
DAVIS, SUMMIT, WASATCH, SANPETE AND
JUAB COUNTIES;

STRAWBERRY WATER USERS
ASSOCIATION, a Utah nonprofit corporation; and
STRAWBERRY HIGH LINE CANAL
COMPANY, a Utah nonprofit corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA;
DEPARTMENT OF THE INTERIOR; BUREAU
OF RECLAMATION;

Respondents.

**JUDGMENT ON PETITIONERS'
MOTION FOR SUMMARY
JUDGMENT RE: OBJECTORS'
LACK OF STANDING AND ORDER
ON OBJECTORS' MOTION TO
STRIKE**

Case No. 360057298 (51-1)

Spanish Fork Canyon No. 1

Judge Kate Toomey

Petitioners' Motion for Summary Judgment Re: Objectors' Lack of Standing ("Petitioners' MSJ") and Objectors' Motion to Strike Portions of Declaration of Jim Riley, P.E. and Affidavit of Kent L. Jones, P.E. came before the Court on September 7, 2010 at 1:30 p.m.

Petitioner Strawberry Waters Users Association appeared through counsel, Scott H. Martin. Petitioner Strawberry High Line Canal Company appeared through counsel, John H. Mabey, Jr. and David C. Wright.

Objectors Magna Water District and South Farm, LLC appeared through counsel, J. Craig Smith and Matthew E. Jensen.

The Utah State Engineer filed a memorandum supporting Petitioners' MSJ and appeared through counsel, L. Ward Wagstaff.

Respondent Central Utah Water Conservancy District joined in Petitioners' MSJ and appeared through counsel, Edwin C. Barnes.

The United States appeared through Thomas K. Snodgrass, Daniel D. Price, Christopher Rich, and Susannah Thomas.

Based on the written submissions of the parties and oral argument presented, the Court orders and enters judgment as follows:

1. Objectors' Motion to Strike Portions of Declaration of Jim Riley, P.E. and Affidavit of Kent L. Jones, P.E. is denied.
2. Petitioners' Motion for Summary Judgment Re: Objectors' Lack of Standing is granted, and this Court finds Objectors have no standing in this matter on the following grounds:
 - a. There are no genuine issues as to material facts and Petitioners are entitled to this judgment as a matter of law;

b. Based on the undisputed facts, Objectors' ground water rights with wells located on the west side of Salt Lake County are up-gradient from the Jordan River, are not affected by the surface water levels in Utah Lake or the Jordan River, and have no call on or a hydrologic connection to the surface water of Utah Lake;

c. Based on the undisputed facts, Objectors do not have a legally protectable interest in this controversy;

d. Based on the undisputed facts, Objectors are not appropriate parties in this matter because they are not interested or positioned in this matter in such a way to effectively assist the Court;

e. Based on the undisputed facts, the issues raised in and by the Utah State Engineer's Proposed Determination have been, or are likely to be, raised by other parties with a stake in this matter;

f. As a matter of law, Objectors do not have standing in this matter based on their ownership of shares of stock in Utah Lake/Jordan River water companies; and

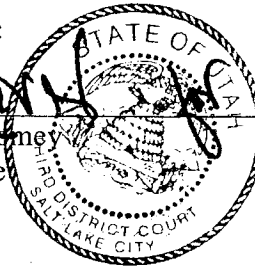
g. Objectors have not presented evidence supporting a finding that they would suffer a distinct and palpable, particularized injury due to the Utah State Engineer's Proposed Determination. In particular, Objectors did not file affidavits in opposition to Petitioners' motion or an affidavit under Rule 56(f) of the Utah Rules of Civil Procedure stating reasons that they could not file affidavits supporting their opposition.

Therefore, Objectors' claims are dismissed with prejudice.

SO ORDERED AND JUDGMENT ENTERED this 30 day of September, 2010.

BY THE COURT:

Honorable Kate Dorney
District Court Judge



APPROVED AS TO FORM:

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Matthew E. Jensen

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Steven E. Clyde

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Utah Attorney General's Office

Ward Wagstaff

Norman K. Johnson

Michael M. Quealy

Attorneys for the Utah State Engineer

United States Department of Justice

Thomas K. Snodgrass

Attorneys for the United States of America

Therefore, Objectors' claims are dismissed with prejudice.

SO ORDERED AND JUDGMENT ENTERED this ____ day of September, 2010.

BY THE COURT:

Honorable Kate Toomey
District Court Judge

APPROVED AS TO FORM:

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Norman K. Johnson
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United States Department of Justice

Thomas K. Snodgrass
Attorneys for the United States of America

Therefore, Objectors' claims are dismissed with prejudice.

SO ORDERED AND JUDGMENT ENTERED this ____ day of September, 2010.

BY THE COURT:

Honorable Kate Toomey
District Court Judge

APPROVED AS TO FORM:

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United States Department of Justice

Thomas K. Snodgrass
Attorneys for the United States of America

Therefore, Objectors' claims are dismissed with prejudice.

SO ORDERED AND JUDGMENT ENTERED this ____ day of September, 2010.

BY THE COURT:

Honorable Kate Toomey
District Court Judge

APPROVED AS TO FORM:

Smith Hartvigsen, PLLC

J. Craig Smith
Matthew E. Jensen
Attorneys for Objectors Magna Water District and South Farm, LLC

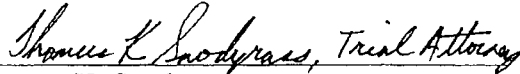
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Michael M. Quealy
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United States Department of Justice


Thomas K. Snodgrass
Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2010, I mailed, postage prepaid, a true and correct copy of the foregoing **JUDGMENT ON PETITIONERS' MOTION FOR SUMMARY JUDGMENT RE: OBJECTORS' LACK OF STANDING AND ORDER ON OBJECTORS' MOTION TO STRIKE** to the following:

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Tab B

Exhibit 1

Notice for Mailing

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO THE USE OF ALL THE WATER,
BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF UTAH LAKE AND JORDAN
RIVER IN UTAH, SALT LAKE, DAVIS, SUMMIT, WASATCH, SANPETE AND JUAB COUNTIES

Strawberry Water Users Ass'n v. United States of America,
Civil No. 360057298 (51-1-1)

TO ALL CLAIMANTS TO THE USE OF RETURN FLOW FROM STRAWBERRY VALLEY PROJECT WATER:

The Strawberry Valley Project (SVP) is a U.S. Bureau of Reclamation project that collects and stores water from the Strawberry River and its tributaries in the Uinta Basin in Utah under Water Rights Nos. 43-3001, 43-3102, 43-1259, and 51-2259. Water Rights Nos. 43-3001, 43-3102, and 43-1259 are certificated in the name of the United States in the amounts of 100,000 acre-feet, 60,000 acre-feet and 6,779 acre-feet, respectively. Underground Water Right No. 51-2259 is certificated in the name of the Strawberry Water Users Association in the amount of 7.0 cubic feet per second. Water diverted under the SVP water rights is released from storage in the Uinta basin and conveyed through tunnels, canals, and natural streams into Utah Valley in the Utah Lake-Jordan River drainage system, where it is used for SVP purposes. After such use, return flows from SVP diversions eventually commingle with water in Utah Lake. Consistent with the Utah Supreme Court's instructions in Strawberry Water Users Association v. Bureau of Reclamation, 2006 UT 19, this Court shall address the following issue pursuant to Utah Code Ann. §73-4-24 in this general adjudication of water rights: Whether the SVP is entitled to a credit under Utah law allowing subsequent use, either directly or by exchange, of the identifiable return flow from the additional water imported from the Uinta basin under the SVP water rights after the return flows have commingled with the water naturally occurring in Utah Lake.

You are hereby notified that the action is commencing as directed by the Utah Supreme Court. Upon service of this notice upon you, you and any potentially affected water rights that you may claim will be subject to the jurisdiction of the Third Judicial District Court. If you determine any water rights that you claim may be affected by this action and you desire to protect your interest, it will be your responsibility to participate in this action. You may be added to the master notice list in this action by returning the Statement of Interest form attached to this notice to the Office of the State Engineer **within 60 days** of service of this notice upon you. The Statement of Interest form is also available to complete and print online at the Division of Water Rights web page at www.waterrights.utah.gov/strawberryreturnflow. Thereafter, you will be copied with all future pleadings, orders, and other materials filed in this action, including the State Engineer's recommendation on the above issue. You may choose to receive further notice by regular mail or by e-mail. Notice by e-mail is preferable because of the cost savings to all participants. It will be your continuing responsibility to monitor the case and determine what further action, if any, is necessary in order to protect your interests in accordance with applicable law, the Utah Rules of Civil Procedure, and such orders as may be entered by the Court. You shall also be responsible for providing the Court and all other parties with a notice of any change in address. All water users and/or claimants who are served notice of this action will be bound by the Court's decision, regardless whether they actively participate in this action.

Additional information concerning this action will be made available on the web page of the Utah Division of Water Rights at www.waterrights.utah.gov/strawberryreturnflow. The Court's mailing and street address is: Third Judicial District Court, 450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84114-1860. Pleadings and orders filed in this action may also be inspected at the Court.

Dated this ____ day of _____, 2008.

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L. Ward Wagstaff
Michael M. Quealy
Assistant Attorneys General
MARK L. SHURTLEFF
Utah Attorney General
Attorneys for the Utah State Engineer
1594 West North Temple, #300
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Telephone: (801) 538-7227

Kathryn Westwood
Clerk, Third Judicial District Court

Exhibit 2

Notice for Publication

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO THE USE OF ALL THE WATER,
BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF UTAH LAKE AND JORDAN
RIVER IN UTAH, SALT LAKE, DAVIS, SUMMIT, WASATCH, SANPETE AND JUAB COUNTIES

Strawberry Water Users Ass'n v. United States of America,
Civil No. 360057298 (51-1-1)

TO ALL CLAIMANTS TO THE USE OF RETURN FLOW FROM STRAWBERRY VALLEY PROJECT WATER:

The Strawberry Valley Project (SVP) is a U.S. Bureau of Reclamation project that collects and stores water from the Strawberry River and its tributaries in the Uinta Basin in Utah under Water Rights Nos. 43-3001, 43-3102, 43-1259, and 51-2259. Water Rights Nos. 43-3001, 43-3102, and 43-1259 are certificated in the name of the United States in the amounts of 100,000 acre-feet, 60,000 acre-feet and 6,779 acre-feet, respectively. Underground Water Right No. 51-2259 is certificated in the name of the Strawberry Water Users Association in the amount of 7.0 cubic feet per second. Water diverted under the SVP water rights is released from storage in the Uinta basin and conveyed through tunnels, canals, and natural streams into Utah Valley in the Utah Lake-Jordan River drainage system, where it is used for SVP purposes. After such use, return flows from SVP diversions eventually commingle with water in Utah Lake. Consistent with the Utah Supreme Court's instructions in Strawberry Water Users Association v. Bureau of Reclamation, 2006 UT 19, this Court shall address the following issue pursuant to Utah Code Ann. §73-4-24 in this general adjudication of water rights: Whether the SVP is entitled to a credit under Utah law allowing subsequent use, either directly or by exchange, of the identifiable return flow from the additional water imported from the Uinta basin under the SVP water rights after the return flows have commingled with the water naturally occurring in Utah Lake.

You are hereby notified that the action is commencing as directed by the Utah Supreme Court. Upon service of this notice upon you, you and any potentially affected water rights that you may claim will be subject to the jurisdiction of the Third Judicial District Court. If you determine any water rights that you claim may be affected by this action and you desire to protect your interest, it will be your responsibility to participate in this action. You may be added to the master notice list in this action by returning a Statement of Interest to the Office of the State Engineer **within 60 days** of service of this notice upon you. Thereafter, you will be copied with all future pleadings, orders, and other materials filed in this action, including the State Engineer's recommendation on the above issue. You may choose to receive further notice by regular mail or by e-mail. Notice by e-mail is preferable because of the cost savings to all participants. It will be your continuing responsibility to monitor the case and determine what further action, if any, is necessary in order to protect your interests in accordance with applicable law, the Utah Rules of Civil Procedure, and such orders as may be entered by the Court. You shall also be responsible for providing the Court and all other parties with a notice of any change in address. All water users and/or claimants who are served notice of this action will be bound by the Court's decision, regardless whether they actively participate in this action.

You may obtain a Statement of Interest form and additional information concerning this action on the web page of the Utah Division of Water Rights at www.waterrights.utah.gov/strawberryreturnflow. You may also obtain a Statement of Interest form by calling 1-866-882-4426. The Court's mailing and street address is: Third Judicial District Court, 450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84114-1860. Pleadings and orders filed in this action may also be inspected at the Court.

Dated this _____ day of _____, 2008.

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THIRD DISTRICT COURT
OCT 17 PM 3:15
SALT LAKE DEPARTMENT
BY *[Signature]*
DEPUTY CLERK

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*Attorneys for Petitioner Strawberry
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

SALT LAKE DEPARTMENT, STATE OF UTAH

IN THE MATTER OF THE GENERAL
DETERMINATION OF THE RIGHTS TO THE
USE OF ALL THE WATER, BOTH SURFACE
AND UNDERGROUND, WITHIN THE
DRAINAGE AREA OF UTAH LAKE AND
JORDAN RIVER IN UTAH, SALT LAKE,
DAVIS, SUMMIT, WASATCH, SANPETE AND
JUAB COUNTIES;

**COMPREHENSIVE CERTIFICATE
OF SERVICE**

STRAWBERRY WATER USERS
ASSOCIATION, a Utah nonprofit corporation; and
STRAWBERRY HIGH LINE CANAL
COMPANY, a Utah nonprofit corporation,

Case No. 360057298 (51-1)

Petitioners,

Spanish Fork Canyon No. 1

vs.

Judge Kate Toomey

UNITED STATES OF AMERICA;
DEPARTMENT OF THE INTERIOR; BUREAU
OF RECLAMATION;

Respondents.

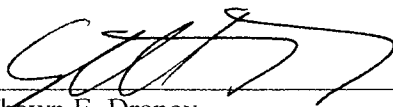
Pursuant to the Court's Minute Entry dated October 12, 2007, at page 6, paragraph 11, Strawberry Water Users Association ("SWUA") submits this Comprehensive Certificate of Service.

Attached hereto as Attachment A, is the listing of those persons or entities which have requested service of pleadings and notice in this case via e-mail.

Attached hereto as Attachment B is the listing of those persons or entities which have requested service of pleadings and notice in this case via United States Mail.

SUBMITTED this 17th day of March, 2009.

SNOW, CHRISTENSEN & MARTINEAU

By: 
Shawn E. Draney
Scott H. Martin
*Attorneys for Petitioner Strawberry Water
Users Association*

CERTIFICATE OF SERVICE

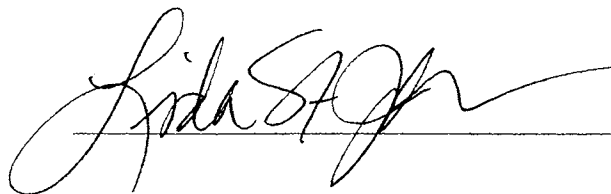
I hereby certify that on the 17th day of March, 2009, I mailed, postage prepaid, a true and correct copy of the foregoing **COMPREHENSIVE CERTIFICATE OF SERVICE** to the following:

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A handwritten signature in cursive script, appearing to read "Linda S. Johnson", is written over a horizontal line.

16038-1 1081437

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Wendell McKinney Family Trust
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American Fork UT 84003

Earl Wengreen
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Spanish Fork UT 84660

William J. and Bettie Joe West
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James W. and Joyce L. Whiting
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Springville UT 84663

David and Candace Wignall
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END OF LIST

Tab D



JON M. HUNTSMAN, JR.
Governor
GARY R. HERBERT
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

Division of Water Rights

MICHAEL R. STYLER KENT L. JONES
Executive Director *State Engineer/Division Director*

TO WATER USERS IN THE UTAH LAKE - JORDAN RIVER GENERAL ADJUDICATION AREA WHO HAVE FILED A STATEMENT OF INTEREST IN THE MATTER OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT

In accordance with Chapter 73-4, Utah Code Annotated and the Order of the Third Judicial District Court dated October 16, 2007, the Utah State Engineer has prepared the State Engineer's Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to Utah Valley by the Strawberry Valley Project.

In response to an earlier notice that was mailed to you and published in local newspapers, you filed a Statement of Interest form requesting further notice in this action. This Proposed Determination and Recommendation is delivered to you electronically or by mail pursuant to your Statement of Interest.

The Proposed Determination and Recommendation contains the State Engineer's recommendation to the court concerning the rights to the use of the return flow from the imported Strawberry Valley Project water. It also includes a Notice to Water Users that explains the requirements for filing an objection and gives directions for obtaining additional copies of the Proposed Determination and Recommendation. It is your responsibility to review the Proposed Determination and Recommendation. If you are dissatisfied with the Proposed Determination and Recommendation, you may file an objection in accordance with the instructions in the Notice to Water Users.

If you have questions regarding this Proposed Determination and Recommendation you may call Teresa Wilhelmsen of the Division of Water Rights at (801) 537-3119 or L. Ward Wagstaff of the Utah Attorney General's Office at (801) 538-7227.

KENT L. JONES, P.E.
State Engineer
P.O. Box 146300
1594 West North Temple
Salt Lake city, Utah 84114-6300

IN THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION
OF THE RIGHTS TO THE USE OF ALL THE WATER, BOTH
SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE
AREA OF UTAH LAKE AND JORDAN RIVER IN UTAH,
SALT LAKE, DAVIS, SUMMIT, WASATCH, SANPETE, AND
JUAB COUNTIES IN UTAH

**PROPOSED DETERMINATION AND
RECOMMENDATION OF THE RIGHTS TO THE
USE OF RETURN FLOW FROM WATER IMPORTED
FROM THE UINTA BASIN TO UTAH VALLEY
BY THE STRAWBERRY VALLEY PROJECT**

UTAH COUNTY DIVISION
AREA NO. 51

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF THE RIGHTS TO THE USE
OF ALL THE WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE
DRAINAGE AREA OF UTAH LAKE AND JORDAN RIVER IN UTAH, SALT LAKE,
DAVIS, SUMMIT, WASATCH, SANPETE, AND JUAB COUNTIES IN UTAH

UTAH COUNTY DIVISION (Area 51)

Salt Lake County Civil No. 360057298 (51-1-1)

NOTICE TO WATER USERS:

This is your copy of the State Engineer's Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to Utah Valley by the Strawberry Valley Project. The Division of Water Rights has prepared this Proposed Determination and Recommendation as directed by the Third Judicial District Court in Salt Lake County, Utah. Additional copies are available on the Division of Water Rights web site at www.waterrights.utah.gov/strawberryreturnflow.

You are hereby notified that under section 73-4-11 of the Utah Code, any person who claims a water right that might be affected by the Strawberry Valley Project return flow who is dissatisfied with the Proposed Determination and Recommendation may file an objection. An objection must be in writing and duly verified on oath. The claimant must file the objection in the Third Judicial District Court in Salt Lake City, 450 South State Street, P.O. Box 1860, Salt Lake City, Utah, 84114, within ninety (90) days after being served with a copy of the Proposed Determination and Recommendation. Service is effective on the date the Proposed Determination and Recommendation is mailed, hand delivered, or delivered by electronic means to the address provided by the claimant. The claimant should also file a copy of the objection with the Division of Water Rights at the address below.

THE INITIAL HEARING ON THE PROPOSED DETERMINATION AND
OBJECTIONS WILL BE HELD **AUGUST 21, 2009, 9:00 AM**, AT THE THIRD
JUDICIAL DISTRICT COURT IN SALT LAKE CITY, UTAH.

Norman K. Johnson
L. Ward Wagstaff
Michael M. Quealy
Assistant Attorneys General
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Utah Attorney General
Attorneys for the Utah State Engineer

Kent L. Jones, P.E.
Utah State Engineer
DIVISION OF WATER RIGHTS
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STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT

INTRODUCTION

The Strawberry Valley Project (SVP) is a U.S. Bureau of Reclamation project that collects and stores water from the Strawberry River and its tributaries in the Uinta Basin in Utah under Water Rights Nos. 43-3001, 43-3102, 43-1259, and 51-2259. Water Rights Nos. 43-3001, 43-3102, and 43-1259 are in the name of the United States in the amounts of 100,000 acre-feet, 60,000 acre-feet, and 6,779 acre-feet respectively. Underground Water Right No. 51-2259 is in the name of the Strawberry Water Users Association in the amount of 7.0 cubic feet per second. With the exception of Water Right 51-2259, water diverted under the SVP water rights is released from storage in the Uinta Basin and conveyed through tunnels, canals, and natural streams into Utah Valley in the Utah Lake - Jordan River drainage system, where it is used for SVP purposes. After such use, return flows from SVP diversions eventually commingle with water in Utah Lake.

Consistent with the Utah Supreme Court's instructions in *Strawberry Water Users Association v. Bureau of Reclamation*, 2006 UT 19, the Third Judicial District Court will address the following issue pursuant to Utah Code Ann. § 73-4-24 in this general adjudication of water rights: Whether the SVP is entitled to a credit under Utah law allowing subsequent use, either directly or by exchange, of the identifiable return flow from the additional water imported from the Uinta Basin under the SVP water rights after the return flows have commingled with the water naturally tributary to or occurring in Utah Lake. In an order dated October 16, 2007, the Third Judicial District Court directed the State Engineer to prepare a proposed determination and recommendation to the court as part of the Utah Lake and Jordan River General Adjudication. This is the State Engineer's Proposed Determination and Recommendation as to whether the SVP is entitled to use, directly or by exchange, the return flow from the imported SVP water. The underlying SVP water rights will be formally adjudicated as part of the regular general adjudication procedure at a later date.

UTAH LAW

Utah law defines the right to use return flow in general. It encourages the efficient use of water and discourages waste. An appropriator may recapture and use return flow from water applied to the appropriator's land if the return flow has not left the land or control of the appropriator and if the appropriator has an authorized beneficial use for the water. If the water leaves the approved place of use and commingles with naturally occurring waters, the appropriator loses the right of recapture.

Imported water is not naturally tributary to the import basin and the importer has the right at any time to cease importation. Except for the importation, neither the imported water nor its return flow would be present in the import basin. Utah law holds that non-tributary water and its return flow are distinct from tributary water and are not a source of water for appropriations of tributary water, even if the non-tributary water is commingled in natural streams with tributary water. State Engineer administrative practice has allowed an importer to claim return flow from imported water and to use the water by exchange where the return flow can be documented and quantified and where the exercise of that exchange does not impair other water rights. Water projects have been designed in reliance on the right to claim and exchange return flows from imported water.

An analogous situation to the recovery of imported water return flow is groundwater recharge and recovery, which is governed by Utah statutes. For example, among the statutory requirements for groundwater recharge and recovery are that the use of the recovered groundwater must be consistent with an approved water right application, the recharge and recovery water is accounted for separately from naturally occurring groundwater, a recovery permit may be issued only to the holder of the recharge permit or its assigns, and ongoing monitoring and accounting reports are required.

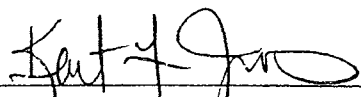
RETURN FLOW FROM SVP IMPORTED WATER

The imported SVP water is not naturally tributary to the Utah Lake - Jordan River drainage and would not be present therein but for its importation. The SVP is the appropriator and importer of the SVP water, and therefore retains the right to put that water to beneficial use, including the portion of the return flow that can be quantified as additional, non-tributary water in the Utah Lake - Jordan River drainage. While return flow from sources within the Utah Lake - Jordan River drainage returns to the stream system to which it is naturally tributary, the imported SVP water does not return to its tributary stream system in the Uinta Basin. If the SVP can account for the quantity and location of the return flow and obtain approval of the necessary water right applications, the SVP may be entitled to use the return flow water directly or by exchange in accordance with the following conditions:

1. The imported water is public water subject to Utah law, including the appropriation procedure and the requirement that beneficial use is the basis, measure, and limit of the right to the use of the water. Return flow from imported water is subject to the laws governing the appropriation of water in Utah and is subject to administration by the State Engineer.
2. The SVP bears the burden of (1) proving that the return flow is attributable to the imported water, and (2) accounting for the quantity of imported water return flow in the Utah Lake - Jordan River drainage. The SVP may assert its rights to the return flow of the imported SVP water only to the extent it can demonstrate the quantity and location of that return flow using engineering and hydrologic analysis acceptable to the State Engineer, including an accounting of the quantity of the return flow each year.
3. All aspects of the use of the return flow must be covered by an approved water right application. If the diversion, beneficial use, place of use, and other aspects of the use of the return flow are allowed by the underlying water rights, the SVP need not file a further water right application. If any of those aspects are not already covered by the underlying water rights, the SVP must obtain an approved water right application for the proposed use. An application to use the SVP water by exchange must fulfill the requirements of Utah law governing such applications.
4. The SVP return flow is a separate source within the Utah Lake - Jordan River drainage and has increased the supply of water in the import basin. The SVP's right to recover and use the return flow from the imported SVP water is superior to any rights acquired by water users who may have otherwise benefitted from the increased water supply. The imported water is subject to distribution and priority calls in the Uinta Basin, where it is diverted, but it is not subject to priority calls in the Utah Lake - Jordan River drainage, where it is used. Tributary water that is used in exchange for SVP return flow may be subject to priority calls in the Utah Lake - Jordan River drainage.
5. The underlying SVP water rights are subject to the requirements and limits of beneficial use under Utah law. As long as the SVP continues to import and use water based on its underlying water rights, it retains the right to use the SVP return flow directly or indirectly by exchange.

This Proposed Determination and Recommendation does not cover every circumstance or question that might arise in the administration of the SVP return flows. The fundamental legal principle is that the SVP, as appropriator and importer of the SVP water, retains the right to use the SVP return flow directly or by exchange, even after the return flow has commingled with water occurring naturally in the Utah Lake - Jordan River drainage. As other issues arise in the administration of the SVP water rights and return flow, they will be addressed in accordance with Utah law.

DATED this 14th day of April, 2009.


Kent L. Jones, P.E.
Utah State Engineer

Tab E

FILED
DISTRICT COURT
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KW

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*Attorneys for
Lake Bottom Irrigation Company,
Magna Water District,
Payson City,
Salem City,
Spanish Fork City, and
South Farm LLC*

IN THE THIRD DISTRICT COURT, STATE OF UTAH
IN AND FOR SALT LAKE COUNTY

In the matter of the General Determination of
the Rights to the Use of All the Water, both
Surface and Groundwater, within the Drainage
Area of Utah Lake and Jordan River in Utah,
Salt Lake, Davis, Summit, Wasatch, Sanpete
and Juab Counties

Subcase:

Strawberry Water Users Association
v.
United States of America

**OBJECTION TO STATE ENGINEER'S
PROPOSED DETERMINATION AND
RECOMMENDATION OF THE RIGHTS
TO THE USE OF RETURN FLOW FROM
WATER IMPORTED FROM THE UINTA
BASIN TO UTAH VALLEY BY THE
STRAWBERRY VALLEY PROJECT**

Civil No. 360057298 (51-1-1)

Honorable Judge Kate Toomey

INTRODUCTION

The State Engineer's Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to the Utah Valley by the Strawberry Valley Project (the "Proposed Determination") is a departure from existing Utah

Law, is not consistent with the law of most other prior appropriation states that have addressed the issue, and is at odds with sound public policy. Lake Bottom Irrigation Company, Magna Water District, Payson City, Salem City, Spanish Fork City, and South Farm LLC (the “Objectors”) have water rights that will be adversely affected if the Court adopts the Proposed Determination. The Objectors therefore respectfully request that the Court reject the Proposed Determination and confirm the existing law that a water importer, like any appropriator, may reuse water up to the consumptive limits of its water right so long as it maintains control of that water and so long as the water does not mingle with the naturally occurring water within the basin.

I. Objectors’ Water Rights Will Likely Be Impaired If the Court Adopts the Proposed Determination

A. Lake Bottom Irrigation Company owns water right numbers 55-6931, 55-6932, 55-6933, 55-6934, 55-6939, 55-6940, 55-6940, 55-6941, and 55-11013. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project (“SVP”) for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

B. Magna Water District owns water right numbers 59-1226, 59-1228, 59-1285, 59-1286, 59-1288, 59-1289, 59-1295, 59-1679, 59-1709, 59-1833, 59-2504, 59-2506, 59-2507, 59-2509, 59-2510, 59-2512, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed

Determination would give credit to the Strawberry Valley Project ("SVP") for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

C. Payson City owns water right numbers 51-1266, 51-1313, 51-1711, 51-1762, 51-1763, 51-1765, 51-2694, 51-3781, 51-6272, 51-7052, 51-7113, 51-7400, 51-7555, 51-7572, 51-7580, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project ("SVP") for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

D. Salem City owns water right numbers 51-1035, 51-1336, 51-2374, 51-2721, 51-2878, 51-6189, 51-6661, 51-7092, 51-7093, 51-7094, 51-7095, 51-7096, 51-7160, 51-7337, 51-7520, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project ("SVP") for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

E. Spanish Fork City owns water right numbers 51-1200, 51-1250, 51-1495, 51-1559, 51-1562, 51-1750, 51-1751, 51-2328, 51-2826, 51-3483, 51-5523, 51-6299, 51-6300, E72, E1661, and other water rights. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water rights because the Proposed Determination would give credit to the Strawberry Valley Project ("SVP") for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

F. South Farm LLC owns water right numbers 59-1197 and 59-5392. Upon reason and belief, adoption of the Proposed Determination will result in impairment of these water

rights because the Proposed Determination would give credit to the Strawberry Valley Project ("SVP") for water that may or may not actually return to Utah Lake, thereby potentially enlarging the SVP water rights.

II. The Proposed Determination Is a Departure from General Utah Return Flow Law and Is at Odds with the Majority Position of Other Prior Appropriation States

In Utah, an appropriator of water rights has the right to divert water from the natural environment and beneficially use the water. Utah Code Ann. § 73-3-1. Most beneficial uses of water, including irrigation, do not fully consume the water used. This typically results in the unconsumed portion of the water (i.e., the return flow) returning to the natural environment for appropriation by others. If an appropriator can maintain possession and control of the water, it can reuse the water up to the consumptive limits of the water right. Once the water leaves the possession and control of the appropriator and returns to the natural environment, however, the water loses its identity as appropriated water and is subject to appropriation by another appropriator. The sensibility and public policy advantages of this long-held rule are readily apparent. This rule encourages and facilitates efficient use of Utah's scarce and valuable water resources and makes it available for multiple uses.

The Proposed Determination suggests creation of an exception for imported water to the general law of Utah that prohibits recapture of water once it has been released to the natural environment and commingled with naturally occurring waters. Such an exception is not supported by existing Utah law, is not good public policy, and is contrary to the majority position of other prior appropriation states that have addressed the issue. The conclusions in the State Engineer's Proposed Determination are based almost entirely on the following recitation of

purportedly Utah Law: “Utah law holds that non-tributary water and its return flow are distinct from tributary water and are not a source of water for appropriations of tributary water, even if the non-tributary water is commingled in natural streams with tributary water.” Proposed Determination ¶ 4. Contrary to the Proposed Determination’s assertion, however, the Utah Supreme Court has made clear that this issue has not “been squarely addressed by [the Utah Supreme Court]” and “is a subject that will deserve full briefing and careful consideration.” *Strawberry Water Users Ass’n v. Bureau of Reclamation*, 2006 UT 19, ¶¶ 58–59, 133 P.3d 410.¹ Indeed, the purpose of this case is to address this issue. To assist the Court in assessing the merits of the Proposed Determination, the remainder of this Part will discuss the background principles of Utah return flow recapture law and the law of other prior appropriation states with regard to recapture of return flow from imported water.

Under Utah law, an appropriator of water in Utah may use, recapture, “and reuse the water so long as it is within the appropriator’s control.” *Strawberry Water Users Ass’n*, 2006 UT 19, ¶ 50 (citing *Estate of Steed v. New Escalante Irr. Co.*, 846 P.2d 1223, 1225 (Utah 1992)). “But once the water has passed to the land of another and out of the control of the user, it is subject to . . . appropriation by others.” *Id.* (citing *Smithfield W. Bench Irrigation Co. v. Union Cent. Life Ins. Co.*, 142 P.2d 866, 868 (Utah 1943)). Furthermore, the Utah Supreme Court has stated as follows:

“Water permitted to escape after it has been appropriated by one, and which finds its way into the natural channel of a stream from which it was taken or into the

¹ The State Engineer is the director of the Division of Water Rights and has responsibility “for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters.” Utah Code Ann. § 73-2-1. The Utah Legislature has not, however, delegated any policy making powers to the State Engineer. *See id.*

channel of another stream cannot be reclaimed by the original appropriator against subsequent appropriators (users) who have made use of it.”

Id. (emphasis original) (quoting *Wrathall v. Johnson*, 40 P.2d 755, 766 (Utah 1935)). Finally, after water has been used and is ““commingled with the waters in the natural water table[,] it has lost its identity as irrigation water and is no longer owned by the [irrigators] as such.”” *Id.* (emphasis and second alteration in original) (quoting *Stubbs v. Ercanbrack*, 368 P.2d 461, 464 (Utah 1962)). Given these clear recitations of the law of return flow, the Proposed Determination is, in essence, suggesting that this Court create a new exception for imported water to these general principles. The Court should not heed this suggestion.

Most of the prior appropriation states that have squarely addressed this issue have determined that return flow from imported water should not be treated any differently than any other return flow that has commingled with the natural environment. For example, the Montana Supreme Court has held that after imported water has percolated through the ground and into a native stream, the importer no longer has any right to recapture the imported water. *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1080 (Mont. 1933). Similarly, under Nebraska law, an importer of water may *not* recapture the return flow from the imported water if the return flow has percolated through the ground and commingled with native stream water. *Northport Irrigation Dist. v. Jess*, 337 N.W.2d 733, 738–39 (Neb. 1983). Finally, the New Mexico Supreme Court has held that “[w]hen an artificial or natural flow of surface water, through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public . . . and are subject to appropriation in accordance with applicable statutes.. *Kelley v. Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966).

Additionally, in the context of reusing effluent, the New Mexico Supreme Court held that “once the effluent actually reaches a water course or underground reservoir,” it cannot be recaptured. *Reynolds v. City of Roswell*, 654 P.2d 537, 540 (N.M. 1982).

The only state that follows the new rule urged in the Proposed Determination is Colorado. But its position with respect to return flow from imported water is established by the Colorado Legislature through statute. See Colo. Rev. Stat. Ann. § 37-82-106 (1979). Neither the Utah Legislature nor even the appellate courts of Utah have enacted the new policy urged by the State Engineer. Furthermore, experience in Colorado has shown the challenges associated with trying to quantify return flow. In *Public Service Company of Colorado v. Willows Water District*, the Colorado Supreme Court reviewed a decision allowing an importer to recapture 10% of the imported water from a native stream because an expert opined that that quantity of return flow had percolated through the ground into the stream. 856 P.2d 829, 830 (Colo. 1993). The Colorado Supreme Court affirmed the trial court because the issue of whether the calculation of return flow was sufficiently reliable had not been preserved. *Id.* at 831. The Court noted, however, that had it been the original factfinder, it may not have found the method of calculating return flow sufficiently reliable. *Id.* at 835. As discussed below in Part III, calculation of return flow is an inexact science that will likely result in impairment of water rights within the Jordan River Drainage.

Based on existing Utah law and decisions from the majority of states that have addressed this issue, this Court should reject the Proposed Determination, which allows SVP to recapture or exchange its return flow after it has commingled with existing water in the natural hydrologic system. Instead, the Court should rule that an importer of water, like any other water right

holder, has the right to capture and reuse the water only so long as it maintains control of that water.

III. Adoption of the Proposed Determination Would Likely Cause Impairment of Existing Rights and Unfair Costs to the State and Other Water Users.

The Court should not adopt the Proposed Determination in this case because its adoption would result in a significant risk of impairment to existing water rights and significant costs to both water users and the state. It is not clear how or to what extent the SVP intends to establish the amount of return flow that makes it to Utah Lake. The Bureau of Reclamation has filed Application to Appropriate A71269 for 49,200 acre-feet of SVP return flow, and Strawberry Water Users Association and High Line Canal have filed Exchange Application E3760 seeking diversion of 15,600 acre-feet based on the alleged return flows to Utah Lake. Under either application, the return flows claimed are both large and unsubstantiated.

The new policy urged by the Proposed Determination is fraught with practical difficulties. There are many factors that make it difficult, if not impossible, to calculate the actual return flow to Utah Lake. The hydrogeology at the place of use and between the place of use and Utah Lake will have a significant impact on how much return flow goes to Utah Lake and how much is lost or goes elsewhere. The hydrogeology will also affect how quickly, if ever, return flow makes it to Utah Lake. Furthermore, the irrigation methods and practices of individual SVP shareholders will impact the return flow quantities. Return flows from flood irrigation vary significantly in relation to return flows from more efficient methods of irrigation. Additionally, many shareholders have supplemental water rights. When and how much water is use under these supplemental water rights would also impact the quantity of return flow. Some

SVP shareholders may also waste water, which, depending on location and hydrogeology, could augment or diminish return flows to Utah Lake. Finally, changes in weather patterns on a year-to-year basis would impact the amount of return flow water.

Because of these and other variables, and because many of these factors depend on the individual shareholders, accurate calculation of the quantity of return flow that actually makes it to Utah Lake is, upon reason and belief, not possible. Ultimately, if the calculation is wrong and water is diverted in excess of the imported water, then all water users in the Jordan River Drainage are potentially adversely impacted. Indeed, such a circumstance would result in a new appropriation in a closed basin, and that appropriation would, based on the Proposed Determination, have priority over all other rights in the basin. This is at odds with foundational principles of the prior appropriation doctrine.

In addition to the inability to accurately determine the return flow amount, the costs of trying to do so will be enormous. The Proposed Determination requires an application whenever return flow is to be recaptured from the natural hydrologic system. Consideration of such an application would require substantial efforts on the part of both the applicant and the State Engineer. Additionally, to protect their water rights against impairment through inflated return flow estimates, other water users within the basin would be required to incur significant expenses to protest these applications by commissioning the necessary expert analyses, reports, and testimony. And the expenses would not be limited to a one-time expenditure, but would arise with each new application. Furthermore, these return flow calculations would require constant monitoring and updating based on the variables discussed above. Thus, the costs associated with

the system proposed in the Proposed Determination would be unfairly allocate in part to the State and to other water users.

Finally, the current state of the law already strikes the proper balance between offering significant advantages to imported water while still promoting full beneficial use of Utah's precious water resources. The law allows an importer of water to capture and reuse its return flows up to 100% consumption so long as it maintains control of that water and does not allow it to commingle with natural waters. *See Strawberry Water Users Ass'n*, 2006 UT 19, ¶ 50. By contrast, native water rights are limited to the consumptive values associated with the original beneficial use to which they were applied. Thus, if SVP wants to recapture its return flow, it is free to do so at the place of use before it returns to the natural hydrologic system. This would eliminate the need for any application with the state and put the cost burden on SVP as opposed to the other water users and the State of Utah. With respect to promoting beneficial use of the water, the law currently allows appropriators to divert from the natural environment without fear that a previous beneficial user somehow maintains ownership of a portion of the water. If the law were changed to allow such enduring ownership for imported water, it would frustrate the policy favoring the maximum beneficial use of water.


Ultimately, adoption of the Proposed Determination would harm Objectors and other typical water right holders in the Jordan River Drainage by creating a significant risk of impairment through miscalculation of return flows, by increasing the costs of protecting against such impairment, and by imposing an imaginary barrier to the full beneficial use of Utah's precious water resources. The costs of pursuing return flows should be born by SVP, not the State and other water users. The current rule, which allows recapture until return flows

commingle with natural waters, properly allocates these costs and protects against impairment of other water rights in the basin.

CONCLUSION

The Court should reject the State Engineer's Proposed Determination because it is a departure from background principles of Utah water law and because it would likely result in impairment of other water rights in the basin. The Court should instead rule that return flow from imported water can be captured and reused so long as the importer maintains control and does not allow the return flow to commingle with natural waters. Objectors reserve the right to submit additional briefing and evidence in support of this Objection.

Respectfully Submitted this 13th Day of July, 2009


SMITH HARTVIGSEN, PLLC
J. Craig Smith
David B. Hartvigsen
Matthew E. Jensen

VERIFICATION

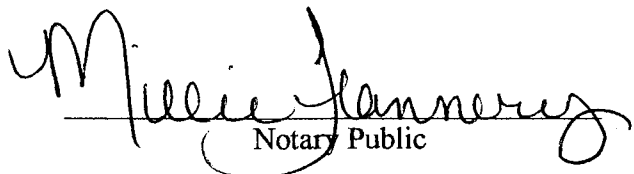
STATE OF UTAH)
 : ss.
COUNTY OF Utah)

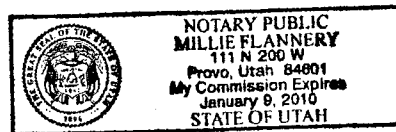
Eldon Packer, as President of Lake Bottom Irrigation Company, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.A, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13 day of July, 2009.



SUBSCRIBED AND SWORN this 13 day of July, 2009.


Notary Public




VERIFICATION

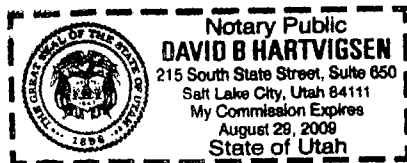
STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake)

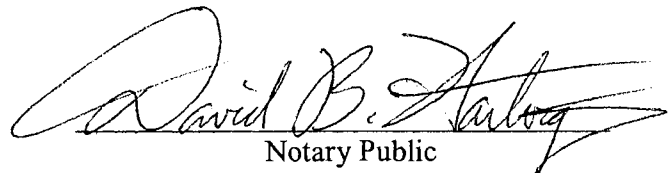
Brent Williams, as Operations Supervisor of Magna Water District, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.B, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13th day of July, 2009.



SUBSCRIBED AND SWORN this 13th day of July, 2009.




Notary Public

VERIFICATION

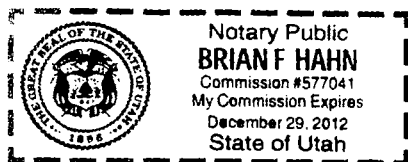
STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake)

Burtis Bills, as Mayor of Payson City, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.C, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13th day of July, 2009.

Burtis Bills

SUBSCRIBED AND SWORN this 13th day of July, 2009.



Brian F. Hahn
Notary Public

VERIFICATION

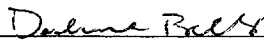
STATE OF UTAH)
 : ss.
COUNTY OF Utah)

J. Lane Henderson, as Mayor of Salem City, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.D, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

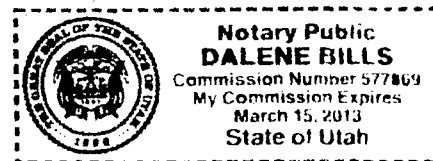
DATED this 9 day of July, 2009.



SUBSCRIBED AND SWORN this 9 day of July, 2009.



Notary Public

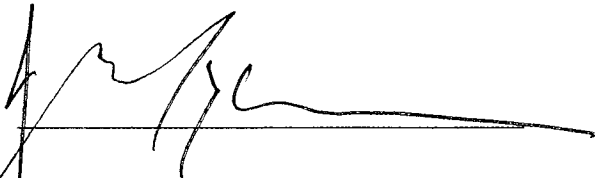


VERIFICATION

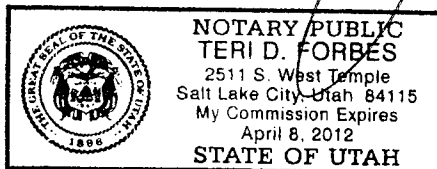
STATE OF UTAH)
 : ss.
COUNTY OF Salt Lake

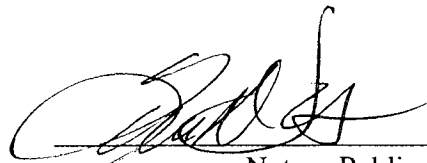
Donald E. Wallace, as Vice President of South Farm LLC, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.F, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 13th day of July, 2009.



SUBSCRIBED AND SWORN this 13th day of July, 2009.




Notary Public

VERIFICATION

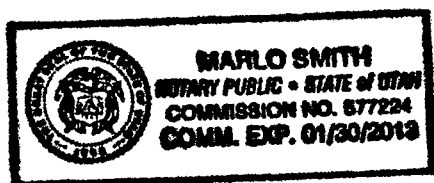
STATE OF UTAH)
 : ss.
COUNTY OF Utah)

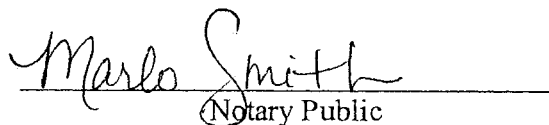
Joe Thomas, as Mayor of Spanish Fork City, being first duly sworn, states under oath that he has read the foregoing **OBJECTION TO STATE ENGINEER'S PROPOSED DETERMINATION AND RECOMMENDATION OF THE RIGHTS TO THE USE OF RETURN FLOW FROM WATER IMPORTED FROM THE UINTA BASIN TO UTAH VALLEY BY THE STRAWBERRY VALLEY PROJECT**, that he knows and understands the contents thereof, that the facts found in Parts I.E, II, and III of said Objection are true and correct to the best of his personal knowledge, except as to any matter alleged on opinion and belief, and as to such matters, he believes them to be true, and that he executes this **OBJECTION** voluntarily of his own free will.

DATED this 10th day of July, 2009.



SUBSCRIBED AND SWORN this 10th day of July, 2009.




Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2009, I caused a true and correct copy of the foregoing *Objection to State Engineer's Proposed Determination and Recommendation of the Rights to the Use of Return Flow from Water Imported from the Uinta Basin to Utah Valley by the Strawberry Valley Project* to be mailed, via first-class U.S. mail, postage pre-paid to the following:

Norman K. Johnson
L. Ward Wagstaff
Assistant Attorneys General
1594 W. North Temple, Suite 300
Salt Lake City, Utah 84116

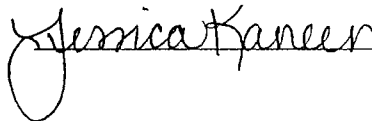
Shawn E. Draney
Keith A. Call
Scott H. Martin
D. Jason Hawkins
Snow Christensen & Martineau
10 Exchange Place, 11th Floor
PO Box 45000
Salt Lake City, Utah 84145

John H. Mabey, Jr.
David C. Wright
Mabey & Wright, LLC
175 S. Main Street, Suite 1330
Salt Lake City, Utah 84111

Christopher Rich
Susannah Thomas
U.S. Department of the Interior
Office of the Solicitor
125 S. State Street, Suite 6201
Salt Lake City, Utah 84138

Thomas K. Snodgrass
U.S. Department of Justice
Environmental and Natural Resources Div.
1961 Stout Street, 8th Floor
Denver, Colorado 80294

Daniel D. Price
Assistant U.S. Attorney
United States Attorney's Office
185 S. State Street, Suite 400
Salt Lake City, Utah 84101

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Tab F

**UTAH CODE
ANNOTATED**

1953

**VOLUME 7C
1989 REPLACEMENT**

Title 73

THE MICHIE COMPANY
Law Publishers
Charlottesville, Virginia

engineer. The names and addresses of such persons so served shall be added to the list prescribed by Section 73-4-3 hereof. Immediately after the notice of the proposed determination is given, in accordance with Section 73-4-11 hereof, the state engineer shall diligently search for the names and addresses of any claimants to water in the source covered by the proposed determination who have not been previously served with summons other than by publication, and any such persons located shall forthwith be served with summons, and after the state engineer has exhausted his search for other claimants he shall make such fact known to the district court by affidavit and the clerk of the district court shall again publish summons five times, once each week, for five successive weeks which said service shall be binding upon all unknown claimants.

History: C. 1943, 100-4-22, added by L. 1948 (1st S.S.), ch. 14, § 5.

73-4-23. Effective date of amendatory act — Applications to pending suits — State engineer's certificate.

This act shall be effective sixty days from its enactment and shall apply to all suits now pending under Title 73, Chapter 4, Utah Code Annotated 1953, except those proceedings under which the state engineer has by the effective date hereof completed his survey, and it is expressly provided that those actions where the state engineer has by the effective date of this act completed his survey may proceed to completion under the procedure prescribed by the statutes heretofore existing. The state engineer shall within ten days after the effective date of this act file with the clerk of the court in each action then pending under Title 73, Chapter 4, Utah Code Annotated 1953, a certificate under the seal of his office stating whether or not he has completed the survey so that all persons will have notice and can know whether or not this act is applicable to such existing suit.

Meaning of "this act." — Laws 1948 (1st S.S.), ch. 14 amended §§ 73-4-3 to 73-4-5 and enacted §§ 73-4-21 to 73-4-24, effective May 25, 1948.

History: C. 1943, 100-4-23, added by L. 1948 (1st S.S.), ch. 14, § 6.

73-4-24. Dispute involving rights of less than all parties to general suit — Petition — Notice — Hearing and determination — Interlocutory decree.

If, during the pendency of a general adjudication suit, there shall be a dispute involving the water rights of less than all of the parties to such suit, any interested party may petition the district court in which the general adjudication suit is pending to hear and determine said dispute. All persons who have a direct interest in said dispute shall be given such notice as is required by order of the district court and in addition thereto the district court shall require that notice of the initial hearing on said dispute be given by publication at least once each week for two successive weeks in newspapers reasonably calculated to give notice to all water users on the system. Thereafter the court may hear and determine the dispute and may enter an interlocu-

tory decree to control the rights of the parties, unless modified or reversed on appeal, until the final decree in the general adjudication suit is entered. At that time the district court may after hearing make such modifications in the interlocutory decree as are necessary to fit it into the final decree without conflict.

History: C. 1943, 100-4-24, added by L. 1948 (1st S.S.), ch. 14, § 7.

NOTES TO DECISIONS

In general.

This statute is permissive and not manda-

tory. *Mitchell v. Spanish Fork W. Field Irrigation Co.*, 1 Utah 2d 313, 265 P.2d 1016 (1954).

COLLATERAL REFERENCES

C.J.S. — 93 C.J.S. Waters § 194.

Key Numbers. — Waters and Water Courses ⇨ 152(2).

CHAPTER 5

ADMINISTRATION AND DISTRIBUTION

Section		Section	
73-5-1.	Appointment of water commissioners — Procedure — Hearing to determine adequacy of underground water supply.	73-5-9.	Powers of state engineer as to waste, pollution or contamination of waters.
73-5-2.	Bond.	73-5-10, 73-5-11.	Repealed.
73-5-3.	Control by engineer of division and distribution under judgments.	73-5-12.	Owners of reservoirs to supply data to state engineer — Installation of gauges.
73-5-4.	Head gates and measuring devices.	73-5-13.	Notice of claim to surface or underground water not otherwise represented — Filing — Form — Information and proof required — Corrections — Prima facie evidence of rights.
73-5-5.	Construction and repair of dams — Submission of plans to engineer for approval — Supervision and inspection — Payment of expenses — Penalty for violation — Exceptions.	73-5-14.	Determination by the state engineer of watershed to which particular source is tributary — Publications of notice and result — Hearing — Judicial review.
73-5-6.	Examination of dams by engineer — Regulation of storage — Expenses.		
73-5-7.	Inspection of ditches and diverting works by engineer.		
73-5-8.	Reports by users to engineer.		

73-5-1. Appointment of water commissioners — Procedure — Hearing to determine adequacy of underground water supply.

(1) If, in the judgment of the state engineer or the district court, it is necessary to appoint one or more water commissioners for the distribution of water from any river system or water source, the commissioner or commissioners shall be appointed annually by the state engineer. The state engineer shall determine whether all or a part of a river system or other water source shall be served by a commissioner, or commissioners, and if only a part is to be